# PAY EQUITY REPORTS

## VOLUME 2
## 1991

## Pay Equity Hearings Tribunal

92-03743/

# PAY EQUITY HEARINGS TRIBUNAL

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# PAY EQUITY REPORTS

## VOLUME 2

(cited as: 2 P.E.R.)

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**1991**

Printed and bound by Union labour in Ontario

## How to Use the Pay Equity Reports

The Pay Equity Reports contain selected decisions of the Pay Equity Hearings Tribunal, accompanied by summaries of the decisons in English and French.

Each volume of the Pay Equity Reports contains a subject index in English and French comprised of abbreviated versions of the full case summaries.

Each volume of the Pay Equity Reports also contains separate consolidated indices of all cases, statutes, rules and authorities referred to throughout the volume. Any case referred to in this volume will appear in the Cases Referred To index. Following the citation for the case, one or more page number(s) will appear. The page number(s) refer(s) the user to the first page in any decision in which a reference to the case is made. The same method of page referencing is employed for the other indices as well.

In a practice that is consistent with the reports services of most labour relations tribunals, the Pay Equity Reports has adopted as the form of citation for its cases an abbreviated version of the employer's name. Where more than one decision in a volume would have the same name based on this nomenclature, the decisions are distinguished by adding to their citations a number reflecting the chronological order of the decisions. Because adopting the employer's name as the method of citing a reported decision may create difficulties for those of our users who might wish to search for cases involving a particular union or other employee organization, the Pay Equity Reports also contains an index of such organizations involved in proceedings before the Tribunal.

## Consultation des Rapports en matière d'équité salariale

Le recueil des Rapports en matière d'équité salariale présente un certain nombre de décisions prises à l'issue des audiences du tribunal, conjointement avec un résumé de la décision en anglais et en français.

Chaque volume des Rapports en matière d'équité salariale comprend un index détaillé en anglais et en français reprenant en abrégé le résumé de l'affaire.

Il comprend également un index récapitulatif de toute la jurisprudence, des lois et règlements et de la doctrine citée dans le volume. Toute affaire citée dans le présent volume figurera dans l'index de la jurisprudence citée. La liste de chaque affaire est suivie par le numéro de la ou des pages correspondantes. Le numéro de page fait référence à la première occurrence dans laquelle la décision fait mention de l'affaire en question. La même méthode de numérotation de page a été suivie dans les autres index.

Selon les principes consacrés de la publication des recueils des décisions de la plupart des tribunaux compétents en matière de relations de travail, toute affaire citée dans les Rapports est identifiée par l'abréviation du nom de l'employeur. Si, dans un même recueil, plus d'une décision se voit attribuer un nom identique selon la nomenclature adoptée, on distingue une décision de l'autre en accompagnant chaque renvoi d'un numéro attestant leur ordre chronologique. Ayant jugé que la méthode visant à adopter le nom de l'employeur pour identifier une décision citée dans les Rapports peut poser un problème au lecteur qui chercherait les affaires mettant en cause une organisation syndicale donnée ou tout autre organisme représentant les employés, les Rapports comprennent également un index des organismes concernés dans les affaires portées devant le tribunal.

# Decisions


## B

*Barrie Public Library Board* 93

## C

*Carlton Cards, Re* 91
*Cornwall General Hospital* 22

## G

*Glengarry Memorial Hospital* 153
*Gloucester (No.1)* 52
*Gloucester (No.2)* 208

## H

*Haldimand–Norfolk (No.6)* 105
*Hospital for Sick Children* 174

## K

*Kingston and Frontenac Children's Aid Society* 31

## L

*Lady Dunn General Hospital* 168
*Liquor Control Board of Ontario* 193

## N

*Nepean Public Library Board (No.1)* 7
*Nepean Public Library Board (No.2)* 18
*New Liskeard Board of Police Commissioners (No.1)* 39
*New Liskeard Board of Police Commissioners (No.2)* 65

## P

*Parkwood Hospital* 178
*Pembroke* 157
*Penetanguishene General Hospital* 25
*Peterborough* 86
*Porcupine Health Unit (No.1)* 78

# Decisions

*Porcupine Health Unit (No.2)* 198

## R

*Riverdale Hospital (No.1)* 1
*Riverdale Hospital (No.2)* 8

## S

*St. Michael's Hospital (No.1)* 183
*St. Michael's Hospital (No.2)* 187

## T

*Thunder Bay Family and Children's Services* 27
*Timmins Board of Commissioners of Police (No.1), Re* 50
*Timmins Board of Commissioners of Police (No.2), Re* 82

## W

*Wentworth Board of Education, Re* 37
*Women's College Hospital (No.3)* 11

# Subjects


**Application of Act**

**Bargaining Agents**

The Applicant embarked on a job evaluation project through which it hoped to achieve both pay equity and internal equity. The Respondent, Canadian Union of Public Employees, Local 1525 ("Local 1525") was invited to participate, and it did so, from time to time seeking the advice of the staff representative from the office of the national union, the Respondent, Canadian Union of Public Employees ("CUPE"). After the project had been underway for some time, CUPE wrote to the Applicant indicating its desire to begin pay equity negotiations. The Applicant objected and maintained that Local 1525 was the bargaining agent responsible for pay equity and that CUPE was bound by the agreements negotiated between the Applicant and Local 1525. The issues before the Tribunal were: is CUPE the bargaining agent?; and if so, is it bound by the agreements between the Applicant and Local 1525? The Tribunal held that CUPE is the bargaining agent, but that it was bound by the agreements already negotiated between the Applicant and Local 1525.

***Gloucester (No. 1)*** ***52***

**Employer**

The issue before the Tribunal was whether the Barrie Public Library Board ("the Board") or the Corporation of the City of Barrie ("the City") is the employer of the employees who work at the library. The Tribunal held that the Board was the employer of the employees at the library.

***Barrie Public Library Board*** ***93***

**Employer**

The Tribunal was asked to determine who was the employer for pay equity purposes of the nurses in the bargaining unit represented by the Applicant: the Porcupine Health Unit ("the Health Unit") or the municipalities in the area served by the Health Unit ("the Participating Municipalities")? The Tribunal held that the Health Unit was the employer.

***Porcupine Health Unit (No. 2)*** ***198***

**Interpretation**

**Application of Charter**

A Review Officer issued an order based on s. 6 of the *Act*. The Applicant Union requested a hearing before the Tribunal with respect to that order and claimed that the Officer's interpretation of s. 6 contravened the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). The issue was whether the Tribunal had the jurisdiction to hear the *Charter* challenge. The Tribunal held that it had the jurisdiction to hear the challenge and apply the *Charter* to the *Act*.

***Parkwood Hospital*** ***178***

**Pay Equity Act**

**Adjustments**

**Benefits**

The Applicant Union objected to a Review Officer's order requiring the Respondent Employer to equalize compensation between a female on male job class by providing the cash value for the difference in vacation entitlement rather than the increased vacation entitlement itself. The Respondent claimed that the order was correct and that what the Applicant sought would cause it undue hardship.

The Tribunal ordered the Respondent to increase the vacation entitlement for the members of the female job class to that of the male job class.

***Lady Dunn General Hospital*** ***168***

# Subjects

**Pay Equity Act...**

**Adjustments...**

**Collective Agreements**

The Applicant began paying a female job class in the bargaining unit represented by the Respondent a pay equity adjustment of $.37 per hour more than the rate specified in the collective agreement to equal the job rate of a comparably valued non-union male job class. When a new job rate became effective under the collective agreement for the female job class, the Respondent also paid the male job class at the same rate. The issue before the Tribunal was the relationship, if any, between the new job rate in the collective agreement and the pay equity adjustment. The Tribunal held that the new job rate in the collective agreement must be increased by $.37 per hour.

***Glengarrry Memorial Hospital*** ***153***

**Entitlement**

The job rate for a female job class in the Respondent's establishment was $222.60 bi-weekly less than the job rate for the comparably valued male job class. There were six salary increments for each job class. Some members of the female job class were paid at a rate lower than the job rate. The issue before the Tribunal was how to adjust the rates of compensation for the incumbents in the female job class. The Tribunal held that the rate of compensation for the members of the female job class at each step should be adjusted to equal the rate of compensation paid to members of the male job class at the corresponding step of their salary range.

***Gloucester (No. 2)*** ***208***

**Maintaining Pay Equity**

The Applicant began paying a female job class in the bargaining unit represented by the Respondent a pay equity adjustment of $.37 per hour more than the rate specified in the collective agreement to equal the job rate of a comparably valued non-union male job class. When a new job rate became effective under the collective agreement for the female job class, the Respondent also paid the male job class at the same rate. The increase to the male job class was considerably smaller than the increases given to the Applicant's other non-union staff. The Respondent argued that the Applicant violated the *Act* by failing to maintain pay equity. The Tribunal held that the employer violated s. 7 of the *Act*.

***Glengarrry Memorial Hospital*** ***153***

**Maintaining Pay Equity**

The New Liskeard Police Association ("the Association") complained that the Board of Commissioners of Police ("the Board") contravened s. 9(2) of the *Act* by shortening an employee's lunch break and requiring her to remain on the premises during it. The Review Officer found that he did not have jurisdiction to make an order under s. 9(2), but went on to find a violation of subsections 7(1) and 22(2)(a) and made an order under subsections 24(2) and 24(3). The Tribunal chose to deal with the merits of the order. The Tribunal revoked the Officer's order.

***New Liskeard Board of Police (No. 2)*** ***65***

**Prohibitions on Intimidation**

The New Liskeard Police Association ("the Association") complained that the Board of Commissioners of Police ("the Board") contravened s. 9(2) of the *Act* by shortening an employee's lunch break and requiring her to remain on the premises during it. The Review Officer found that he did not have jurisdiction to make an order under s. 9(2), but went on to find a violation of subsections 7(1) and 22(2)(a) and made an order under subsections 24(2) and 24(3). The Tribunal chose to deal with the merits of the s. 9(2) complaint. The Tribunal held that the employer had not violated s. 9(2) of the *Act*.

***New Liskeard Board of Police (No. 2)*** ***65***

# Subjects


**Pay Equity Process**

**Comparisons**

**Vacant Male Job Class**

A position previously filled by a single male incumbent had been vacant for several years. Classification of the position and its wage rate continued to be included in the collective agreement. The issue for the Tribunal was whether the job class consisting of the position was available as a comparator.

***Barrie Public Library Board*** *93*

**Gender Neutral Comparison System**

**Elements**

The Applicant alleged that the point factor job evaluation system proposed by the Respondent was not gender neutral because it did not systematically identify and redress systemic discrimination in nurses' wages. In particular, it was alleged that the system failed to systematically, comprehensively and accurately describe, measure and value the job content of the work performed by the nurses in the bargaining units represented by the Applicant. The Tribunal held that the system was not gender neutral.

***Haldimand–Norfolk (No. 6)*** *105*

**Negotiation**

**Good Faith – Choice of Representative**

The Applicant embarked on a job evaluation project through which it hoped to achieve both pay equity and internal equity. The Respondent, Canadian Union of Public Employees, Local 1525 ("Local 1525") was invited to participate, and it did so, from time to time seeking the advice of the staff representative from the office of the national union, the Respondent, Canadian Union of Public Employees ("CUPE"). After the project had been underway for some time, Local 1525 requested that the CUPE staff representative be permitted to attend meetings. The Applicant refused. The Tribunal expressed its concern regarding the Applicant's refusal but made no finding that it violated the *Act*.

***Gloucester (No. 1)*** *52*

**Good Faith – Choice of Representative**

The Applicant alleged that the Respondent failed to negotiate in good faith and endeavour to agree upon a pay equity plan and a gender neutral comparison system by:

(1) unilaterally hiring a consulting firm and using the consultant as spokesperson in negotiations without the agreement of the Applicant;

(2) choosing the system and investing too much in it prior to negotiations to be willing to honestly bargain;

(3) using the mandatory time frames as an excuse to by-pass its bargaining obligations;

(4) refusing to recognize the bargaining agent;

(5) drafting the initial job questionnaire and pilot testing the system without the agreement of the applicant;

(6) abdicating all responsibility to the consultant and failing to meaningfully negotiate with the Applicant;

(7) refusing to disclose significant information, including results of the pilot test, to the Applicant, which prevented the Applicant from evaluating the Respondent's proposals;

(8) planning to implement one comparison system across the Municipal Corporation without negotiating with the Union; and

(9) failing to engage in rational discussion or to respond adequately to the Applicant's criticisms, questions or proposals.

# Subjects

**Pay Equity Process...**
**Negotiation...**

The Tribunal held that the Respondent breached the bargaining duty in engaging in conduct described in allegations 2, 4, 6, 7, 8 and 9. The Tribunal found that the Employer had failed to bargain in good faith. The Employer contended that it was entitled to act as it did because the *Act* placed paramount responsibility on the Employer for the achievement of pay equity. The Tribunal rejected the Employer's defence.

***Haldimand–Norfolk (No. 6)*** ***105***

**Good Faith – Content of Proposals**

The Applicant alleged that the Respondent failed to negotiate in good faith and endeavour to agree upon a pay equity plan and a gender neutral comparison system by:

(1) unilaterally hiring a consulting firm and using the consultant as spokesperson in negotiations without the agreement of the Applicant;

(2) choosing the system and investing too much in it prior to negotiations to be willing to honestly bargain;

(3) using the mandatory time frames as an excuse to by–pass its bargaining obligations;

(4) refusing to recognize the bargaining agent;

(5) drafting the initial job questionnaire and pilot testing the system without the agreement of the applicant;

(6) abdicating all responsibility to the consultant and failing to meaningfully negotiate with the Applicant;

(7) refusing to disclose significant information, including results of the pilot test, to the Applicant, which prevented the Applicant from evaluating the Respondent's proposals;

(8) planning to implement one comparison system across the Municipal Corporation without negotiating with the Union; and

(9) failing to engage in rational discussion or to respond adequately to the Applicant's criticisms, questions or proposals.

The Tribunal held that the Respondent breached the bargaining duty in engaging in conduct described in allegations 2, 4, 6, 7, 8 and 9. The Tribunal found that the Employer had failed to bargain in good faith. The Employer contended that it was entitled to act as it did because the *Act* placed paramount responsibility on the Employer for the achievement of pay equity. The Tribunal rejected the Employer's defence.

***Haldimand–Norfolk (No. 6)*** ***105***

**Good Faith – Disclosure**

The Applicant embarked on a job evaluation project through which it hoped to achieve both pay equity and internal equity. The Respondent, Canadian Union of Public Employees, Local 1525 ("Local 1525") was invited to participate, and it did so, from time to time seeking the advice of the staff representative from the office of the national union, the Respondent, Canadian Union of Public Employees ("CUPE"). After the project had been underway for some time, CUPE wrote to the Applicant indicating its desire to bargain over pay equity and requested disclosure of information concerning the comparison system and the results of the evaluation. The Tribunal ordered the Applicant to release the information.

***Gloucester (No. 1)*** ***52***

# Subjects

**Pay Equity Process...**
**Negotiation...**

**Good Faith – Disclosure**

The Applicant alleged that the Respondent failed to negotiate in good faith and endeavour to agree upon a pay equity plan and a gender neutral comparison system by:

(1) unilaterally hiring a consulting firm and using the consultant as spokesperson in negotiations without the agreement of the Applicant;

(2) choosing the system and investing too much in it prior to negotiations to be willing to honestly bargain;

(3) using the mandatory time frames as an excuse to by-pass its bargaining obligations;

(4) refusing to recognize the bargaining agent;

(5) drafting the initial job questionnaire and pilot testing the system without the agreement of the applicant;

(6) abdicating all responsibility to the consultant and failing to meaningfully negotiate with the Applicant;

(7) refusing to disclose significant information, including results of the pilot test, to the Applicant, which prevented the Applicant from evaluating the Respondent's proposals;

(8) planning to implement one comparison system across the Municipal Corporation without negotiating with the Union; and

(9) failing to engage in rational discussion or to respond adequately to the Applicant's criticisms, questions or proposals.

The Tribunal held that the Respondent breached the bargaining duty in engaging in conduct described in allegations 2, 4, 6, 7, 8 and 9. The Tribunal found that the Employer had failed to bargain in good faith. The Employer contended that it was entitled to act as it did because the *Act* placed paramount responsibility on the Employer for the achievement of pay equity. The Tribunal rejected the Employer's defence.

***Haldimand-Norfolk (No. 6)*** ***105***

**Good Faith – Disclosure**

The Applicant employer objected to a Review Officer's order directing it to disclose the compensation schedules for its non-unionized positions to the Respondent bargaining agent. The issues before the Tribunal were whether the Respondent required the compensation schedules in order to agree upon job classes for the purposes of determining possible male comparisons and whether this information was necessary or relevant to the Respondent's ability to assess the gender neutrality of the proposed comparison systems. The Tribunal ordered disclosure.

***Riverdale Hospital (No. 1)*** ***1***

**Good Faith – Full and Informed Discussion**

The Applicant alleged that the Respondent failed to negotiate in good faith and endeavour to agree upon a pay equity plan and a gender neutral comparison system by:

(1) unilaterally hiring a consulting firm and using the consultant as spokesperson in negotiations without the agreement of the Applicant;

(2) choosing the system and investing too much in it prior to negotiations to be willing to honestly bargain;

(3) using the mandatory time frames as an excuse to by-pass its bargaining obligations;

(4) refusing to recognize the bargaining agent;

(5) drafting the initial job questionnaire and pilot testing the system without the agreement of the applicant;

(6) abdicating all responsibility to the consultant and failing to meaningfully negotiate with the Applicant;

(7) refusing to disclose significant information, including results of the pilot test, to the Applicant, which prevented the Applicant from evaluating the Respondent's proposals;

(8) planning to implement one comparison system across the Municipal Corporation without negotiating with the Union; and

(9) failing to engage in rational discussion or to respond adequately to the Applicant's criticisms, questions or proposals.

The Tribunal held that the Respondent breached the bargaining duty in engaging in conduct described in allegations 2, 4, 6, 7, 8 and 9. The Tribunal found that the Employer had failed to bargain in good faith. The Employer contended that it was entitled to act as it did because the *Act* placed paramount responsibility on the Employer for the achievement of pay equity. The Tribunal rejected the Employer's defence.


***Haldimand–Norfolk (No. 6)*** ***105***


**Good Faith – Recognition of Bargaining Agent**

The Applicant alleged that the Respondent failed to negotiate in good faith and endeavour to agree upon a pay equity plan and a gender neutral comparison system by:

(1) unilaterally hiring a consulting firm and using the consultant as spokesperson in negotiations without the agreement of the Applicant;

(2) choosing the system and investing too much in it prior to negotiations to be willing to honestly bargain;

(3) using the mandatory time frames as an excuse to by–pass its bargaining obligations;

(4) refusing to recognize the bargaining agent;

(5) drafting the initial job questionnaire and pilot testing the system without the agreement of the applicant;

(6) abdicating all responsibility to the consultant and failing to meaningfully negotiate with the Applicant;

(7) refusing to disclose significant information, including results of the pilot test, to the Applicant, which prevented the Applicant from evaluating the Respondent's proposals;

(8) planning to implement one comparison system across the Municipal Corporation without negotiating with the Union; and

(9) failing to engage in rational discussion or to respond adequately to the Applicant's criticisms, questions or proposals.

The Tribunal held that the Respondent breached the bargaining duty in engaging in conduct described in allegations 2, 4, 6, 7, 8 and 9. The Tribunal found that the Employer had failed to bargain in good faith. The Employer contended that it was entitled to act as it did because the *Act* placed paramount responsibility on the Employer for the achievement of pay equity. The Tribunal rejected the Employer's defence.


***Haldimand–Norfolk (No. 6)*** ***105***

# Subjects


**Pay Equity Plan**

**Agreement**

Pay equity negotiations between representatives of the City of Pembroke ("the City") and representatives of the Pembroke Police Association ("the Association") resulted in a memorandum of settlement. When the City presented the settlement to the Board of Commissioners of Police for the City of Pembroke ("the Board"), the Board did not approve the plan. The Association maintained that the Board was bound by the agreement. The Tribunal held that the Board was bound by the agreement and ordered the parties to execute its terms.

***Pembroke*** *157*

**PEHT**

**Hearing**

**Jurisdiction**

The Applicant challenged the jurisdiction of a Review Officer to determine a "who is the employer" question, and the Officer asked for the submissions of all parties on the question. Prior to the Officer's receipt of all the submissions, the Applicant applied to the Tribunal, asking it to determine whether the Officer had jurisdiction. The issue was whether the question of the Officer's jurisdiction was properly before the Tribunal. The Tribunal held that the application was premature.

***Thunder Bay Family and Children's Services*** *27*

**Jurisdiction**

The Applicant objected to a Review Officer's order identifying it as the pay equity employer of the employees in the bargaining unit represented by the Respondent, CUPE, Local 2175. Prior to the first day of hearing, CUPE wrote to the Applicant and the Respondent, Children's Aid Society ("CAS") requesting the production of certain documents. Production was refused. The issues before the Tribunal were whether it had jurisdiction to order production of the requested documents, and if so, which documents, if any, were to be produced. The Tribunal ordered production of the requested documents.

***Kingston and Frontenac Children's Aid Society*** *31*

**Jurisdiction**

At the time the application for hearing was made to the Tribunal, no settlement had been reached and the review officer had not yet made an order or referred the matter to the Tribunal. The preliminary issue was whether the Tribunal had the jurisdiction to hear and determine the case. The Tribunal held that the application was premature and that it therefore did not have jurisdiction to hear it.

***St. Michael 's Hospital (No. 2)*** *187*

**Jurisdiction**

**Appointment of Agent**

A group of nurses employed by the Applicant Hospital objected to the pay equity plan posted by the Hospital. A review officer issued an order requiring the Hospital to amend the plan and adjust the job rate for registered nurses. The Hospital objected to the order and requested a hearing before the Tribunal. Two of the Respondent nurses asked the Tribunal (1) to order the Hospital to fund their costs of defending the review officer's order before the Tribunal; or in the alternative, (2) to appoint an agent to represent them at the Tribunal or to name the Pay Equity Office ("the Office") as their agent. The issue was whether the Tribunal had the jurisdiction to make any of these orders. The Tribunal held that it had no jurisdiction to order the Hospital to fund the pay equity litigation of the nurses. It also declined to appoint an agent to represent the nurses, or to name the Office as their agent.

***Hospital for Sick Children*** *174*

# Subjects


**PEHT**

**Jurisdiction**

**Bias**

The issue raised by the application was "who is the employer". At the end of the Respondent's argument, the Tribunal invited the parties to make submissions on the criteria for determining this issue set out in *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R. 17. Specifically, the parties were asked to address whether the outcome of the application would be altered if the Tribunal were to change its focus and consider either exclusively or with greater weight the criteria of who has control over compensation practices and who attaches value to work. The Applicant claimed that both the timing and the essence of the question gave rise to an apprehension of bias, violated the principles of natural justice and constituted an excess of jurisdiction. The Tribunal held that the Applicant's allegations were not substantiated.

***Porcupine Health Unit (No. 1)*** ***78***

**Canadian Charter of Rights and Freedom**

A Review Officer issued an order based on s. 6 of the *Act*. The Applicant Union requested a hearing before the Tribunal with respect to that order and claimed that the Officer's interpretation of s. 6 contravened the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). The issue was whether the Tribunal had the jurisdiction to hear the *Charter* challenge. The Tribunal held that it had the jurisdiction to hear the challenge and apply the *Charter* to the *Act*.

***Parkwood Hospital*** ***178***

**Concurrent with Arbitrator**

The respondent in a dispute being heard by the Tribunal asked the Tribunal to rule that the dispute could not proceed to arbitration if one or the other of the parties did not like the result of the hearing. The Tribunal declined to issue the order.

***New Liskeard Board of Police Commissioners (No. 1)*** ***39***

**Costs**

A group of nurses employed by the Applicant Hospital objected to the pay equity plan posted by the Hospital. A review officer issued an order requiring the Hospital to amend the plan and adjust the job rate for registered nurses. The Hospital objected to the order and requested a hearing before the Tribunal. Two of the Respondent nurses asked the Tribunal (1) to order the Hospital to fund their costs of defending the review officer's order before the Tribunal; or in the alternative, (2) to appoint an agent to represent them at the Tribunal or to name the Pay Equity Office ("the Office") as their agent. The issue was whether the Tribunal had the jurisdiction to make any of these orders. The Tribunal held that it had no jurisdiction to order the Hospital to fund the pay equity litigation of the nurses. It also declined to appoint an agent to represent the nurses, or to name the Office as their agent.

***Hospital for Sick Children*** ***174***

**Natural Justice**

The issue raised by the application was "who is the employer". At the end of the Respondent's argument, the Tribunal invited the parties to make submissions on the criteria for determining this issue set out in *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R. 17. Specifically, the parties were asked to address whether the outcome of the application would be altered if the Tribunal were to change its focus and consider either exclusively or with greater weight the criteria of who has control over compensation practices and who attaches value to work. The Applicant claimed that both the timing and the essence of the question gave rise to an apprehension of bias, violated the principles of natural justice and constituted an excess of jurisdiction. The Tribunal held that the Applicant's allegations were not substantiated.

***Porcupine Health Unit (No. 1)*** ***78***

# Subjects


**PEHT...**

**Jurisdiction...**

**Prima facie case**

The Applicant objected to a Review Officer's order directing that certain job classes in its establishment were of comparable value. The Respondent moved to have the application dismissed on grounds that it did not disclose a *prima facie* case. The Tribunal dismissed the application.

***Peterborough*** *86*

**Prima facie case**

A group of employees and one individual employee requested a hearing before the Tribunal with respect to a pay equity plan prepared by a review officer. The applications alleged essentially that the job class to which the employees belonged had been undervalued. The employer also requested a hearing. At the outset of the hearing the panel on its own motion questioned whether any of the applicants had demonstrated a *prima facie* case in their pleadings. The Tribunal held that a *prima facie* case had been made out.

***Liquor Control Board of Ontario*** *193*

**Remedies**

**Failure to Negotiate in Good Faith**

The Tribunal found that an Employer had failed to negotiate the component parts of a gender neutral comparison system; failed to recognize the bargaining agent; failed to disclose information; failed to engage in full and informed discussion; and proposed a comparison system that did not meet the standard of gender neutrality. The issue was what remedy the Tribunal should order. The Tribunal ordered the Respondent to negotiate in good faith and to endeavour to agree with the Applicant upon a gender neutral comparison system and a pay equity plan. It ordered both parties to table proposals within 60 days, to co-operate with each other, and to provide full disclosure concerning the comparison systems proposed.

***Haldimand-Norfolk (No. 6)*** *105*

**Revocation of Orders**

The Applicant objected to a Review Officer's order requiring the Respondent to equalize compensation between a female on male job class by providing the cash value for the difference in vacation entitlement rather than the increased vacation entitlement itself. The Respondent took the position that the Tribunal could not revoke or vary the Review Officer's order unless it violated the *Act*, or was incorrect in relation to the *Act*. The Tribunal held that its role is not limited to determining whether the order is incorrect or contravenes the *Act*, and that it would deal with the original issue between the parties.

***Lady Dunn General Hospital*** *168*

**Practice and Procedure**

**Adjournments**

The parties agreed to adjourn the application *sine die* and that none of them would bring it back on for hearing until after the release of the Ontario Court of Appeal decision in *Re Haldimand-Norfolk and Ontario Nurses' Association* (1989), 1 P.E.R. 188 (Div. Ct.); leave to appeal granted April 17, 1990 (Ont. C.A.). An adjournment *sine die* was requested and the issue before the Tribunal was whether to grant it. The Tribunal adjourned the matter and advised the parties that unless one of them requested otherwise, it would terminate the matter one year, subject to any objections the parties might have about this proposed procedure.

***Nepean Public Library Board (No. 1)*** *7*

# Subjects

**Practice and Procedure...**

**Adjournments...**

The parties agreed to adjourn the application *sine die* and that none of them would bring it back on for hearing until after the release of the Ontario Court of Appeal decision in *Re Haldimand-Norfolk and Ontario Nurses' Association* (1989), 1 P.E.R. 188 (Div. Ct.); leave to appeal granted April 17, 1990 (Ont. C.A.). In *Nepean Public Library Board (No.1)* (1990), 2 P.E.R 7, the Tribunal adjourned the hearing of this application *sine die*, but advised the parties that it proposed to terminate the matter at the expiry of one year from that date unless one of them brought the matter back on for hearing within that time. The parties were invited to make submissions on this proposal. The City and the Library objected to the proposed limit on the *sine die* adjournment. The issue before the Tribunal was whether to impose the proposed limitation. The Tribunal imposed the proposed limitation.

***Nepean Public Library Board (No. 2)*** ***18***

**Adjournments**

By agreement, the parties in several cases before the Tribunal requested that the Tribunal: (1) adjourn the applications until the Tribunal had determined the *Women's College Hospital* case; and then (2) list the applications before the panel hearing *Women's College Hospital*. The parties also advised the Tribunal of their agreement to reserve the right to complete any outstanding pleadings at the time of the relisting of the application. The Tribunal granted the adjournments subject to the requirement that the applicant in each case inform the Tribunal within thirty days of the release of reasons for decision in *Women's College Hospital* of its intention to proceed with the case or not. It declined to direct that the applications be listed before the *Women's College Hospital* panel and held that the question of the completion of outstanding pleadings was more properly one for the panel assigned to hear the case.

***Cornwall General Hospital*** ***22***

**Adjournments**

The parties in several applications before the Tribunal requested that the Tribunal adjourn the applications until the Tribunal had determined the *Women's College Hospital* cases. The Tribunal required further submissions from the parties explaining why it might be of assistance to adjourn these matters pending the determination of *Women's College Hospital*.

***Penetanguishene General Hospital*** ***25***

**Dismissal Without a Hearing**

The Applicant objected to a Review Officer's order directing that certain job classes in its establishment were of comparable value. The Respondent moved to have the application dismissed on grounds that it did not disclose a *prima facie* case. The Tribunal dismissed the application.

***Peterborough*** ***86***

**Dismissal Without a Hearing**

A group of employees and one individual employee requested a hearing before the Tribunal with respect to a pay equity plan prepared by a review officer. The applications alleged essentially that the job class to which the employees belonged had been undervalued. The employer also requested a hearing. At the outset of the hearing the panel on its own motion questioned whether any of the applicants had demonstrated a *prima facie* case in their pleadings. The Tribunal held that a *prima facie* case had been made out.

***Liquor Control Board of Ontario*** ***193***

# Subjects

**Practice and Procedure...**

**Intervention**

The Aplicant Union alleged that the Respondent Hospitals had failed to bargain in good faith and to endeavour to agree upon a gender neutral comparison system contrary to s. 14 of the *Act*. The Hospitals counterclaimed against the Union on the same grounds. The claims and counter–claims in respect of each workplace were consolidated, and the three consolidated hearings were ordered to be heard together. PMSK, a job evalution consulting company, applied to intervene, claiming that it had an interest in the subject matter of the proceedings.

***Women's College Hospital (No. 3)*** ***11***

**Intervention**

The Ontario Nurses' Association ("ONA") alleged that the comparison system St. Michael's Hospital ("the Employer") proposed to use would be gender–biased when applied to the nurses in the bargaining unit represented by ONA. Hay Management Consultants Ltd. ("Hay"), the marketer of the system the Employer proposed to use, sought to intervene in the proceedings as a party, grounding its entitlement to do so on its commercial interest in the outcome of the proceedings. The Tribunal dismissed Hay's application to intervene as a party.

***St. Michael's Hospital (No. 1)*** ***183***

**Notifications**

A Review Officer notified the Tribunal under s. 23 (2) of the *Act* that she had been unable to settle an employee's complaint of a violation of s. 9(2) of the *Act* and that she would not be disposing of the matter by order. The issue was whether the Tribunal was required to hold a hearing on the basis of the notification alone. The Tribunal held that it would not proceed with the complaint until it received an application.

***Wentworth Board of Education, Re*** ***37***

**Precedent**

The issue before the Tribunal was whether the Barrie Public Library Board ("the Board") or the Corporation of the City of Barrie ("the City") is the employer of the employees who work at the library. The Tribunal held that the Board was the employer of the employees at the library.

***Barrie Public Library Board*** ***93***

**Precedent**

The Tribunal was asked to determine the identity of the employer of nurses in the bargaining unit represented by the Applicant. In each of three previous "who is the employer" cases, the Tribunal had adopted a similar approach to this question. In a fourth case, *Barrie Public Library Board* (1991) 2 P.E.R. 93, the Tribunal had departed from this approach. The issue was which approach the Tribunal would use in this case. The Tribunal adopted the approach in the *Barrie Public Library Board* case.

***Porcupine Health Unit (No. 2)*** ***198***

**Production of Documents**

The Applicant objected to a Review Officer's order identifying it as the pay equity employer of the employees in the bargaining unit represented by the Respondent, CUPE, Local 2175. Prior to the first day of hearing, CUPE wrote to the Applicant and the Respondent, Children's Aid Society ("CAS") requesting the production of certain documents. Production was refused. The issues before the Tribunal were whether it had jurisdiction to order production of the requested documents, and if so, which documents, if any, were to be produced. The Tribunal ordered production of the requested documents.

***Kingston and Frontenac Children's Society*** ***31***

# Subjects

**Practice and Procedure...**

**Reconsideration**

The Applicant requested the Tribunal to reconsider its decision ordering the Applicant to disclose certain information to the Respondent. The Tribunal declined to reconsider.

*Riverdale Hospital (No. 2)* 8

**Referrals**

A Review Officer formed the opinion that neither of the parties had complied with his order and referred the matter to the Tribunal. Neither party made an application to the Tribunal. The Tribunal requested the parties to make submissions as to how it ought to proceed.

*Timmins Board of Commisioners of Police (No. 1), Re* 50

**Referrals**

A Review Officer formed the opinion that neither of the parties had complied with his order and referred the matter to the Tribunal. Neither party made an application to the Tribunal. In *Re Timmins Board of Commissioners of Police (No.1)* (1990), 2 P.E.R. 50, the Tribunal directed the parties to make submissions as to how to proceed. The Parties did not respond specifically to the Tribunal's questions, but instead indicated that they were still in the process of negotiating pay equity. The Tribunal held that it was not appropriate for it to proceed with the referral.

*Timmins Board of Commisioners of Police (No. 2), Re* 82

**Referrals**

A review officer formed the opinion that an Employer was not complying with his order and referred the matter to the Tribunal. Neither the Employer nor the Union had applied to the Tribunal requesting a hearing about the order. The Tribunal ordered the Registrar to schedule the case for a hearing at which it asked the parties to make submissions on how the Tribunal ought to proceed.

*Carlton Cards, Re* 91

**Witnesses**

**Review Officer**

The New Liskeard Police Association ("the Association") complained that the Board of Commissioners of Police ("the Board") contravened s. 9(2) of the *Act* by shortening an employee's lunch break and requiring her to remain on the premises during it. The employer claimed that the change had been made in order to conform to the collective agreement, and had been effected on the advice of a Review Officer. The Board applied to the Tribunal for a hearing objecting to the Review Officer's order that the employee's lunch break be reinstated, and arguing that the Officer was biased. In a letter to the Registrar of the Tribunal, the Board requested the Tribunal's consent to compel the Officer to testify. The Board did not advise the Review Officer or the Pay Equity Office of this request, and they were not present at the hearing. The issues for the Tribunal were whether the Board had followed the proper steps in seeking the Tribunal's consent to have the Officer testify, and if so, whether such consent should be granted. The Tribunal held that the procedure followed was proper, but refused to grant its consent.

*New Liskeard Board of Police Commissioners (No. 1)* 39

# Subjects

**Review Services**

**Jurisdiction**

The New Liskeard Police Association ("the Association") complained that the Board of Commissioners of Police ("the Board") contravened s. 9(2) of the *Act* by shortening an employee's lunch break and requiring her to remain on the premises during it. The Review Officer found that he did not have jurisdiction to make an order under s. 9(2), but went on to find a violation of subsections 7(1) and 22(2)(a) and made an order under subsections 24(2) and 24(3). In an earlier decision [*New Liskeard Board of Police Commissioners (No.1)* (1990), 2 P.E.R. 39 ], the Tribunal invited the parties to make submissions on the proper procedure to be followed. The Tribunal held that the Officer did not have jurisdiction to deal with the s.9(2) complaint.

***New Liskeard Board of Police Commissioners (No. 2)*** **65**

# Sujets


**Champ d'application de la Loi**

**Agent négociateur**

L'auteur de la requête a mis sur pied un programme d'évaluation des emplois qui lui permettrait, c'est ce qu'il espérait, d'atteindre à la fois l'objectif d'équité salariale et d'équité interne. La partie intimée, la section locale 1525 («section locale 1525») du Syndicat canadien de la fonction publique, a été invitée à y participer. La section locale 1525 a effectivement participé au programme et obtenu, à l'occasion, les conseils du représentant du personnel du bureau national, à savoir le Syndicat canadien de la fonction publique(«le Syndicat») qui constitue l'intimé. Quelque temps après le début du fonctionnement du programme, le Syndicat a communiqué à l'auteur de la requête son désir d'entreprendre des négociations dans le domaine de l'équité salariale. L'auteur de la requête s'y est opposé en faisant valoir que la section locale locale 1525 constituait l'agent négociateur responsable de la question de l'équité salariale et que le Syndicat était lié par les ententes conclues entre l'auteur de la requête et la section locale 1525. Les questions dont était saisi le tribunal étaient les suivantes : Est-ce que le Syndicat constitue l'agent négociateur? Si oui, est-il lié par les ententes conclues entre l'auteur de la requête et la section locale 1525? Le Tribunal a statué que le Syndicat était l'agent négociateur, mais qu'il était lié par les ententes qui avaient déjà été conclues entre l'auteur de la requête et la section locale 1525.

***Gloucester (No. 1)*** **52**

**Employeur**

Le Tribunal devait décider si le Conseil des bibliothèques publiques de Barrie («le Conseil») ou la municipalité de la ville de Barrie («la Ville») était l'employeur du personnel de la bibliothèque. Le Tribunal a statué que le Conseil était l'employeur du personnel de la bibliothèque.

***Barrie Public Library*** **93**

**Employeur**

Le Tribunal a été chargé de déterminer l'employeur, aux fins de l'équité salariale, des infirmières comprises dans l'unité de négociation que représentait le requérant : était-ce la circonscription sanitaire de Porcupine («la circonscription sanitaire») ou les municipalités dans les territoires desservis par la circonscription sanitaire («les municipalités participantes»)? Le Tribunal a statué que la circonscription sanitaire était l'employeur.

***Porcupine Health Unit (No. 2)*** **198**

**Interprétation**

**Application de la Charte**

Un agent de révision a donné un ordre fondé sur l'article 6 de la *Loi*. Le syndicat constitué partie requérante a demandé une audience devant le Tribunal relativement à cet ordre et a prétendu que l'interprétation de l'article 6 par l'agent enfreignait la *Charte canadienne des droits et libertés* («la *Charte*»). Le Tribunal devait décider s'il était compétent pour entendre la cause relative à la *Charte*. Le Tribunal a statué qu'il était compétent pour entendre l'affaire et appliquer la *Charte* à la *Loi*.

***Parkwood Hospital*** **178**

# Sujets


**Loi sur l'équité salariale**

**Maintien de l'équité salariale**

L'Association de police de New Liskeard («l'Association») s'est plainte que la Commission de police («la Commission») avait enfreint le paragraphe 9 (2) de la *Loi* lorsqu'elle a raccourci la pause-repas d'une employée et lui a demandé de la prendre sur son lieu de travail. L'agent de révision a conclu qu'il n'avait pas la compétence nécessaire pour donner un ordre relativement à une infraction au paragraphe 9 (2), mais il a conclu que le paragraphe 7 (1) et l'alinéa 22 (2) a) avaient été enfreints et a donné un ordre en vertu des paragraphes 24 (2) et (3). Le Tribunal a décidé de traiter du bien-fondé de l'ordre. Le Tribunal a révoqué l'ordre de l'agent.

***New Liskeard Board of Police Commissioners*** *65*

**Maintien de l'équité salariale**

L'auteur de la requête a commencé à verser aux membres d'une catégorie d'emplois à prédominance féminine comprise dans l'unité de négociation représentée par l'intimé un rajustement au titre de l'équité salariale de 0,37 $ l'heure. Ce rajustement était supérieur au taux précisé dans la convention collective pour que la rétribution de ces membres soit égale au taux de catégorie accordé à une catégorie d'emplois à prédominance masculine non syndiquée et utilisée à des fins de comparaison. Quand un nouveau taux de catégorie est entré en vigueur en vertu de la convention collective en ce qui concerne la catégorie d'emplois à prédominance féminine, l'intimé a versé le même taux aux membres de la catégorie d'emplois à prédominance masculine. L'augmentation versée à la catégorie d'emplois à prédominance masculine était considérablement inférieure aux majorations que l'auteur de la requête avait consenties aux autres catégories de personnel non syndiqué. L'intimé a soutenu que l'auteur de la requête avait enfreint la *Loi* car il n'avait pas maintenu des pratiques de rétribution assurant l'équité salariale. Le Tribunal a statué que l'employeur avait enfreint l'article 7 de la *Loi*.

***Glengarry Memorial Hospital*** *153*

**Manoeuvres d'intimidation interdites**

L'Association de police de New Liskeard («l'Association») s'est plainte que la Commission de police («la Commission») avait enfreint le paragraphe 9 (2) de la *Loi* lorsqu'elle a raccourci la pause-repas d'une employée et lui a demandé de la prendre sur son lieu de travail. L'agent de révision a conclu qu'il n'avait pas la compétence nécessaire pour donner un ordre relativement à une infraction au paragraphe 9 (2), mais il a conclu que le paragraphe 7 (1) et l'alinéa 22 (2) a) de la *Loi* avaient été enfreints et il a donné un ordre en vertu des paragraphes 24 (2) et (3). Le Tribunal a décidé de traiter du bien-fondé de la plainte relative à l'infraction au paragraphe 9 (2). Le Tribunal a statué que l'employeur n'avait pas enfreint le paragraphe 9 (2) de la *Loi*.

***New Liskeard Board of Police Commissioners*** *65*

**Rajustements**

**Avantages**

L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui exigeait que l'intimé comble l'écart qui existait entre les congés payés accordés aux membres d'une catégorie d'emplois à prédominance féminine et ceux qui étaient accordés aux personnes appartenant à une catégorie d'emplois à prédominance masculine au moyen d'une prestation en espèces au lieu d'augmenter la durée des congés payés. L'intimé prétendait que l'ordre était correct et que la requête de l'auteur de la requête lui causerait un préjudice indû. Le Tribunal a ordonné à l'intimé d'augmenter les congés payés des membres de la catégorie d'emplois à prédominance féminine pour qu'ils correspondent à ceux de la catégorie d'emplois à prédominance masculine.

***Lady Dunn General Hospital*** *168*

# Sujets


**Loi sur l'équité salariale...**

**Rajustements...**

**Conventions collectives**

L'auteur de la requête a commencé à verser aux membres d'une catégorie d'emplois à prédominance féminine comprise dans l'unité de négociation représentée par l'intimé un rajustement au titre de l'équité salariale de 0,37 $ l'heure. Ce rajustement était supérieur au taux précisé dans la convention collective pour que la rétribution de ces membres soit égale au taux de catégorie accordé à une catégorie d'emplois à prédominance masculine non syndiquée et utilisée à des fins de comparaison. Quand un nouveau taux de catégorie est entré en vigueur en vertu de la convention collective en ce qui concerne la catégorie d'emplois à prédominance féminine, l'intimé a versé le même taux aux membres de la catégorie d'emplois à prédominance masculine. La question dont était saisi le Tribunal était la suivante : quel rapport, le cas échéant, existe-t-il entre le nouveau taux de catégorie de la convention collective et le rajustement prévu en matière d'équité salariale. Le Tribunal a statué que le nouveau taux de catégorie précisé dans la convention collective doit être majoré de 0,37 $ l'heure.

***Glengarry Memorial Hospital*** ***153***

**Rajustements de la rétribution**

La différence entre le taux de catégorie relié à une catégorie d'emplois à prédominance féminine et celui relié à la catégorie d'emplois à prédominance masculine ayant une valeur comparable dans l'établissement de la partie intimée s'élevait à 222,60 $ toutes les deux semaines. Chaque catégorie d'emplois comportait six augmentations de salaire. Certaines travailleuses appartenant à la catégorie d'emplois à prédominance féminine touchaient une rétribution inférieure au taux de catégorie. Le Tribunal devait décider de la façon de rajuster les taux de rétribution des titulaires de poste de la catégorie d'emplois à prédominance féminine. Le Tribunal a statué que le taux de rétribution des membres de la catégorie d'emplois à prédominance féminine à chaque échelon devrait être rajusté pour être égal au taux de rétribution des membres de la catégorie d'emplois à prédominance masculine de l'échelon correspondant de leur échelle de salaires.

***Gloucester (No. 2)*** ***208***

**Système non sexiste de comparaison**

**Éléments**

Le requérant prétendait que le système d'évaluation à points des emplois que proposait l'intimé était sexiste, car il n'identifiait pas ni n'éliminait, de façon systématique, les éléments discriminatoires systémiques compris dans le salaire des infirmières. Il soutenait notamment que le système ne décrivait pas, ne mesurait pas, ni n'évaluait, d'une façon systématique, globale et exacte, les spécifications du travail des infirmières comprises dans les unités de négociation que représentait le requérant. Le Tribunal a statué que le système était sexiste.

***Haldimand-Norfolk (No. 6)*** ***105***

**Pratique et procédure**

**Ajournements**

Les parties ont convenu d'ajourner indéfiniment la requête et de ne pas demander d'audience tant que la Cour d'appel de l'Ontario n'aurait pas rendu sa décision dans l'affaire *Haldimand-Norfolk et l'Association des infirmières et infirmiers de l'Ontario* (1989), 1 P.E.R. 188 (Cour div.). L'autorisation d'interjeter appel a été accordée le 17 avril 1990 (Cour d'appel de l'Ontario). L'auteur de la requête et l'intimé ont convenu de demander un ajournement indéfini de l'audience. La question dont était saisi le Tribunal était la suivante : doit-il donner suite à la demande d'ajournement? Le Tribunal a ajourné l'affaire et a informé les parties que sauf demande contraire, il y mettrait fin dans l'année, sous réserve des objections que les parties pourraient avoir en ce qui concerne ce projet de marche à suivre.

***Nepean Public Library (No. 1)*** ***7***

# Sujets

**Pratique et procédure...**

**Ajournements**

Les parties ont convenu d'ajourner indéfiniment la requête et de ne pas demander d'audience tant que la Cour d'appel de l'Ontario n'aurait pas rendu sa décision dans l'affaire *Haldimand–Norfolk et l'Association des infirmières et infirmiers de l'Ontario* (1989), 1 P.E.R. 188 (Cour div.). L'autorisation d'interjeter appel a été accordée le 17 avril 1990 (Cour d'appel de l'Ontario). Dans *Conseil de bibliothèques publiques de Nepean (no 1)* (1990), 2 P.E.R. 7, le Tribunal a ajourné indéfiniment l'audition de la requête mais informé les parties qu'il se proposait de mettre fin à l'affaire un an plus tard, jour pour jour, sauf si l'une d'entre elles le saisissait à nouveau de l'affaire au cours de ce délai. Il a invité les parties à lui présenter des observations sur cette proposition. La ville et la bibliothèque se sont opposées au délai de péremption proposé. La question dont était saisi le Tribunal était la suivante : doit-il imposer ou non ce délai de péremption? Le Tribunal a imposé le délai de péremption proposé.

***Nepean Public Library (No. 2)*** *18*

**Ajournements**

Les parties à plusieurs instances devant le Tribunal se sont entendues pour lui demander ce qui suit : 1) ajourner leurs requêtes jusqu'à ce qu'il ait statué sur l'affaire du *Women's College Hospital*; 2) inscrire les requêtes au rôle d'audience du comité chargé d'entendre l'affaire du *Women's College Hospital*. Les parties ont également avisé le Tribunal qu'elles s'étaient entendues pour se réserver le droit d'exécuter tout acte de procédure inachevé au moment de la nouvelle inscription de leur requête au rôle. Le Tribunal a accueilli les demandes d'ajournement à la condition suivante : le requérant, dans chaque cause, devra informer le Tribunal, dans les trente jours qui suivent la publication des raisons motivant la décision prise dans l'affaire du *Women's College Hospital*, de son intention de donner suite ou non à sa requête. Il a refusé d'ordonner que les requêtes soient inscrites au rôle d'audience du comité qui a entendu l'affaire du *Women's College Hospital* et a conclu que la question relative à l'exécution des actes de procédure devait plutôt être tranchée par le comité chargé d'entendre l'affaire.

***Cornwall General Hospital*** *22*

**Ajournements**

Les parties à plusieurs requêtes présentées au Tribunal lui ont demandé d'ajourner les requêtes jusqu'à ce qu'il ait statué sur les causes du *Women's College Hospital*. Le Tribunal a demandé aux parties de lui communiquer des observations supplémentaires sur les raisons pour lesquelles il serait utile d'ajourner ces affaires en attendant la décision relative au *Women's College Hospital*.

***Penetanguishene General Hospital*** *25*

**Avis**

L'agente de révision a informé le Tribunal, en vertu du paragraphe 23(2) de la *Loi*, qu'elle n'avait pas pu régler la plainte d'une employée concernant une infraction au paragraphe 9(2) de la *Loi* et qu'elle ne donnerait pas d'ordre. Le point en litige était le suivant : le Tribunal est-il tenu de tenir une audience à la suite uniquement de cet avis? Le Tribunal a statué qu'il n'allait pas donner suite à la plainte tant qu'une requête ne lui serait pas présentée.

***Wentworth Board of Education, Re*** *37*

**Pratique et procédure...**

**Intervention**

L'auteur de la requête, le syndicat, a prétendu que l'intimé, à savoir les hôpitaux, n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un système de comparaison non sexiste contrairement à l'article 14 de la *Loi*. Les hôpitaux ont déposé une demande reconventionnelle à l'encontre du syndicat en faisant valoir les mêmes raisons. Les demandes et demandes reconventionnelles relatives à chaque lieu de travail ont été réunies et il a été ordonné que les trois audiences réunies soient entendues ensemble. La société d'experts-conseils en matière d'évaluation des emplois, PMSK, a demandé le droit d'intervenir en faisant valoir qu'elle avait un intérêt dans l'instance. Le Tribunal a rejeté la requête de PMSK en intervention.

***Women's College Hospital (No. 3)*** *11*

**Intervention**

L'auteur de la requête, le syndicat, a prétendu que l'intimé, à savoir les hôpitaux, n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un système de comparaison non sexiste contrairement à l'article 14 de la *Loi*. Les hôpitaux ont déposé une demande reconventionnelle à l'encontre du syndicat en faisant valoir les mêmes raisons. Les demandes et demandes reconventionnelles relatives à chaque lieu de travail ont été réunies et il a été ordonné que les trois audiences réunies soient entendues ensemble. La société d'experts-conseils en matière d'évaluation des emplois, PMSK, a demandé le droit d'intervenir en faisant valoir qu'elle avait un intérêt dans l'instance. Le Tribunal a rejeté la requête de PMSK en intervention.

***St. Michael's Hospital (No. 1)*** *183*

**Précédent**

Le Tribunal devait décider si le Conseil des bibliothèques publiques de Barrie («le Conseil») ou la municipalité de la ville de Barrie («la Ville») était l'employeur du personnel de la bibliothèque. Le Tribunal a statué que le Conseil était l'employeur du personnel de la bibliothèque.

***Barrie Public Library Board*** *93*

**Précédent**

On a demandé au Tribunal d'établir l'identité de l'employeur des infirmières comprises dans l'unité de négociation que représentait le requérant. Dans trois causes qu'il a entendues sur l'identité d'un employeur, le Tribunal a adopté une démarche semblable. Dans une quatrième cause, à savoir le *Conseil des bibliothèques publiques de Barrie* (1991) 2 P.E.R. 93, le Tribunal s'est écarté de cette démarche. Dans la présente affaire, la question en litige était de savoir quelle démarche le Tribunal allait adopter. Le Tribunal a adopté la démarche utilisée dans l'affaire du *Conseil des bibliothèques publiques de Barrie*.

***Porcupine Health Unit (No. 2)*** *198*

**Production de documents**

L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui l'identifiait comme l'employeur, aux fins de l'équité salariale, des employés compris dans l'unité de négociation représentée par l'intimé, à savoir la section locale 2175 du Syndicat canadien de la fonction publique. Avant le premier jour d'audience, le Syndicat a demandé, par écrit, à l'auteur de la requête et à l'intimé, la Société d'aide à l'enfance («la Société») de produire certains documents. Les parties en question ont refusé de produire ces documents. Les questions dont était saisi le Tribunal étaient les suivantes : le Tribunal a-t-il compétence pour ordonner la production des documents demandés et, dans ce cas, quels documents doivent être produits? Le Tribunal a ordonné la production des documents demandés.

***Kingston and Frontenac Children's Society*** *31*

# Sujets

**Pratique et procédure...**

**Réexamen**

L'auteur de la requête a demandé au Tribunal de réexaminer sa décision de lui ordonner de divulguer certains renseignements à l'intimé. Le Tribunal a refusé de procéder à un réexamen.

***Riverdale Hospital (No. 2)*** *8*

**Rejet sans audience**

L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui précisait que certaines catégories d'emplois dans son établissement avaient une valeur comparable. L'intimé a présenté une motion pour que la requête soit rejetée parce qu'elle ne divulgait pas une affaire à première vue. Le Tribunal a rejeté la requête.

***Peterborough*** *86*

**Rejet sans audience**

Un groupe d'employées et une autre employée, à titre individuel, ont demandé une audience devant le Tribunal en ce qui concerne le programme d'équité salariale préparé par un agent de révision. Elles prétendaient, dans leurs requêtes, que la catégorie d'emplois à laquelle elles appartenaient avait été sous-évaluée. L'employeur a également demandé de se faire entendre. Au tout début de l'audience, le comité a demandé, de son propre chef, si un des requérants avait établi une cause à première vue dans ses actes de procédure. Le Tribunal a statué qu'une cause à première vue avait été établie.

***Liquor Control Board of Ontario*** *193*

**Renvois**

L'agent de révision était d'avis que les parties n'avaient pas respecté son ordre et il a renvoyé la question au Tribunal. Aucune partie n'a présenté de requête au Tribunal. Le Tribunal a demandé aux parties de lui présenter des observations sur la marche à suivre.

***Timmins Board of Commissioners of Police (No. 1), Re*** *50*

**Renvois**

L'agent de révision était d'avis que les parties n'avaient pas respecté son ordre et il a renvoyé la question au Tribunal. Aucune partie n'a présenté de requête au Tribunal. Dans *Commission de police de Timmins (no 1)* (1990), 2 P.E.R. 50, le Tribunal a ordonné aux parties de lui présenter des observations sur la marche à suivre. Les parties n'ont pas répondu spécifiquement aux questions du Tribunal mais elles ont indiqué qu'elles étaient encore en train de négocier un programme d'équité salariale. Le Tribunal a statué qu'il n'était pas approprié de donner suite au renvoi.

***Timmins Board of Commissioners of Police (No. 2), Re*** *82*

**Renvois**

Un agent de révision était d'avis qu'un employeur ne respectait pas son ordre et a saisi le Tribunal de la question. Ni l'employeur ni le syndicat n'avaient demandé au Tribunal de se faire entendre relativement à l'ordre. Le Tribunal a ordonné au greffier de fixer les date, heure et lieu d'une audience. Au cours de cette audience, il a demandé aux parties de lui présenter des observations sur la façon dont il devrait procéder.

***Carlton Cards, Re*** *91*

# Sujets

**Pratique et procédure...**

**Témoins**

**Agent de révision**

L'Association de police de New Liskeard («l'Association») s'est plainte que la Commission de police («la Commission») avait enfreint le paragraphe 9 (2) de la *Loi* lorsqu'elle a raccourci la pause-repas d'une employée et lui a demandé de la prendre sur son lieu de travail. L'employeur a prétendu que cette modification avait eu pour but de respecter les conditions de la convention collective et avait été mise en oeuvre suite aux conseils d'un agent de révision. La Commission a demandé une audience devant le Tribunal, car elle contestait l'ordre de l'agent de révision stipulant que la pause-repas de l'employée soit ramenée à sa durée antérieure et elle prétendait que l'agent avait un parti pris. Dans une lettre qu'elle a adressée au greffier du Tribunal, la Commission a demandé au Tribunal de contraindre l'agent à témoigner. La Commission n'a pas communiqué cette demande à l'agent de révision ni au Bureau de l'équité salariale et ceux-ci n'ont pas assisté à l'audience. Le Tribunal devait décider si la Commission avait respecté la procédure appropriée pour obtenir son consentement en ce qui concerne le témoignage de l'agent et, dans l'affirmative, si ce consentement devrait être accordé. Le Tribunal a statué que la procédure suivie était tout à fait appropriée, mais a refusé de donner son consentement.

***New Liskeard Board of Police Commissioners (No.1)*** ***40***

**Processus d'équité salariale**

**Comparaisons**

**Catégorie d'emplois à prédominance masculine vacante**

Un poste qu'occupait auparavant un seul titulaire masculin était vacant depuis plusieurs années. La classification de ce poste et l'échelle de salaires qui s'y rapporte continuaient de figurer dans la convention collective. Le Tribunal devait décider si la catégorie d'emplois qui comprenait ce poste pouvait servir à des fins de comparaison. Le Tribunal a statué que la catégorie d'emplois qui comprenait un poste vacant ne pouvait pas convenablement servir à des fins de comparaison.

***Barrie Public Library Board*** ***93***

**Négociation**

**Bonne foi – choix des représentants**

L'auteur de la requête a mis sur pied un programme d'évaluation des emplois qui lui permettrait, c'est ce qu'il espérait, d'atteindre à la fois l'objectif d'équité salariale et d'équité interne. La partie intimée, la section locale 1525 («section locale 1525») du Syndicat canadien de la fonction publique, a été invité à y participer. La section locale 1525 a effectivement participé au programme et obtenu, à l'occasion, les conseils du représentant du personnel du bureau national, à savoir le Syndicat canadien de la fonction publique, qui constitue l'intimé. Quelque temps après le début du fonctionnement du programme, la section locale 1525 a demandé que le représentant du personnel puisse assister aux réunions. L'auteur de la requête a refusé. Le Tribunal s'est inquiété du refus de l'auteur de la requête, mais il n'a pas conclu que celui-ci avait enfreint la *Loi*.

***Gloucester (No. 1)*** ***50***

**Bonne foi – Choix de représentant**

Le requérant prétendait que l'intimé n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un programme d'équité salariale et d'un système non sexiste de comparaison. Il a invoqué ce qui suit :

1) l'intimé a unilatéralement engagé une firme d'experts-conseils et retenu les services d'un consultant comme porte-parole lors des négociations sans l'accord du requérant;

2) il a choisi un système et y a investi trop d'efforts et d'argent avant les négociations pour être en mesure de négocier honnêtement;

**Processus d'équité salariale...**
**Négociation...**

3) il a invoqué les délais prescrits pour contourner ses obligations en matière de négociations;

4) il a refusé de reconnaître l'agent de négociateur;

5) il a rédigé la version initiale du questionnaire sur l'emploi et a procédé à l'essai-pilote du système sans l'accord du requérant;

6) il a délégué toutes ses responsabilités à l'expert-conseil et n'a pas négocié de façon valable avec le requérant;

7) il a refusé de divulguer des renseignements importants, y compris les résultats de l'essai-pilote, au requérant, ce qui a empêché ce dernier d'évaluer les propositions de l'intimé;

8) il a planifié de mettre en oeuvre un système de comparaison à l'échelle de la municipalité sans négocier avec le syndicat;

9) il a refusé de participer à des discussions rationnelles ou de répondre convenablement aux critiques, aux questions ou aux propositions du requérant.

Le Tribunal a statué que l'intimé avait manqué à son devoir de négociation lorsqu'il a exercé les activités décrites aux points 2, 4, 6, 7, 8 et 9.

***Haldimand Norfolk (No. 6)*** ***105***

**Bonne foi - Contenu des propositions**

Le requérant prétendait que l'intimé n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un programme d'équité salariale et d'un système non sexiste de comparaison. Il a invoqué ce qui suit :

1) l'intimé a unilatéralement engagé une firme d'experts-conseils et retenu les services d'un consultant comme porte-parole lors des négociations sans l'accord du requérant;

2) il a choisi un système et y a investi trop d'efforts et d'argent avant les négociations pour être en mesure de négocier honnêtement;

3) il a invoqué les délais prescrits pour contourner ses obligations en matière de négociations;

4) il a refusé de reconnaître l'agent de négociateur;

5) il a rédigé la version initiale du questionnaire sur l'emploi et a procédé à l'essai-pilote du système sans l'accord du requérant;

6) il a délégué toutes ses responsabilités à l'expert-conseil et n'a pas négocié de façon valable avec le requérant;

7) il a refusé de divulguer des renseignements importants, y compris les résultats de l'essai-pilote, au requérant, ce qui a empêché ce dernier d'évaluer les propositions de l'intimé;

8) il a planifié de mettre en oeuvre un système de comparaison à l'échelle de la municipalité sans négocier avec le syndicat;

9) il a refusé de participer à des discussions rationnelles ou de répondre convenablement aux critiques, aux questions ou aux propositions du requérant.

# Sujets

**Processus d'équité salariale...**
**Négociation...**

Le Tribunal a statué que l'intimé avait manqué à son devoir de négociation lorsqu'il a exercé les activités décrites aux points 2, 4, 6, 7, 8 et 9.

***Haldimand Norfolk (No. 6)*** ***105***

**Bonne foi – Défense**

Le Tribunal a conclu que l'employeur n'avait pas négocié de bonne foi. L'employeur a soutenu qu'il avait le droit de faire ce qu'il a fait, car la *Loi* lui confère la responsabilité ultime de réaliser l'équité salariale. Le Tribunal a rejeté le moyen de défense de l'employeur.

***Haldimand Norfolk (No. 6)*** ***105***

**Bonne foi – Divulgation**

L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui lui ordonnait de divulguer à l'intimé, aux fins de négocier un programme d'équité salariale pour l'unité de négociation qu'il représentait, les grilles de rétribution relatives aux postes non syndiqués. Les questions dont était saisi le Tribunal étaient les suivantes : l'intimé a-t-il besoin de ces grilles de rétribution pour convenir des catégories d'emploi aux fins de définir d'éventuelles catégories d'emplois à prédominance masculine pouvant servir à des fins de comparaison et ces renseignements sont-ils nécessaires ou liés à l'aptitude de l'intimé d'évaluer le caractère non sexiste des systèmes de comparaison proposés? Le Tribunal a ordonné la divulgation de ces renseignements.

***Riverdale Hospital (No. 1)*** ***1***

**Bonne foi – Divulgation**

L'auteur de la requête a mis sur pied un programme d'évaluation des emplois qui lui permettrait, c'est ce qu'il espérait, d'atteindre à la fois l'objectif d'équité salariale et d'équité interne. La partie intimée, la section locale 1525 («section locale 1525») du Syndicat canadien de la fonction publique, a été invité à y participer. Elle a effectivement participé au programme et obtenu, à l'occasion, les conseils du représentant du personnel du bureau national, à savoir le Syndicat canadien de la fonction publique qui constitue l'intimé. Quelque temps après le début du fonctionnement du programme, le Syndicat a écrit à l'auteur de la requête pour lui faire part de son désir d'entreprendre des négociations dans le domaine de l'équité salariale. Il a demandé que des renseignements concernant le système de comparaison et les résultats de l'évaluation lui soient divulgués. Le Tribunal a ordonné à l'auteur de la requête de divulguer les renseignements demandés.

***Gloucester (No. 1)*** ***50***

**Bonne foi – Divulgation**

Le requérant prétendait que l'intimé n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un programme d'équité salariale et d'un système non sexiste de comparaison. Il a invoqué ce qui suit :

1) l'intimé a unilatéralement engagé une firme d'experts-conseils et retenu les services d'un consultant comme porte-parole lors des négociations sans l'accord du requérant;

2) il a choisi un système et y a investi trop d'efforts et d'argent avant les négociations pour être en mesure de négocier honnêtement;

3) il a invoqué les délais prescrits pour contourner ses obligations en matière de négociations;

4) il a refusé de reconnaître l'agent de négociateur;

5) il a rédigé la version initiale du questionnaire sur l'emploi et a procédé à l'essai-pilote du système sans l'accord du requérant;

6) il a délégué toutes ses responsabilités à l'expert-conseil et n'a pas négocié de façon valable avec le requérant;

**Processus d'équité salariale...**
**Négociation...**

7) il a refusé de divulguer des renseignements importants, y compris les résultats de l'essai-pilote, au requérant, ce qui a empêché ce dernier d'évaluer les propositions de l'intimé;

8) il a planifié de mettre en oeuvre un système de comparaison à l'échelle de la municipalité sans négocier avec le syndicat;

9) il a refusé de participer à des discussions rationnelles ou de répondre convenablement aux critiques, aux questions ou aux propositions du requérant.

Le Tribunal a statué que l'intimé avait manqué à son devoir de négociation lorsqu'il a exercé les activités décrites aux points 2, 4, 6, 7, 8 et 9.

***Haldimand Norfolk (No. 6)*** ***105***

**Bonne foi – Échanges francs et éclairés**

Le requérant prétendait que l'intimé n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un programme d'équité salariale et d'un système non sexiste de comparaison. Il a invoqué ce qui suit :

1) l'intimé a unilatéralement engagé une firme d'experts-conseils et retenu les services d'un consultant comme porte-parole lors des négociations sans l'accord du requérant;

2) il a choisi un système et y a investi trop d'efforts et d'argent avant les négociations pour être en mesure de négocier honnêtement;

3) il a invoqué les délais prescrits pour contourner ses obligations en matière de négociations;

4) il a refusé de reconnaître l'agent de négociateur;

5) il a rédigé la version initiale du questionnaire sur l'emploi et a procédé à l'essai-pilote du système sans l'accord du requérant;

6) il a délégué toutes ses responsabilités à l'expert-conseil et n'a pas négocié de façon valable avec le requérant;

7) il a refusé de divulguer des renseignements importants, y compris les résultats de l'essai-pilote, au requérant, ce qui a empêché ce dernier d'évaluer les propositions de l'intimé;

8) il a planifié de mettre en oeuvre un système de comparaison à l'échelle de la municipalité sans négocier avec le syndicat;

9) il a refusé de participer à des discussions rationnelles ou de répondre convenablement aux critiques, aux questions ou aux propositions du requérant.

Le Tribunal a statué que l'intimé avait manqué à son devoir de négociation lorsqu'il a exercé les activités décrites aux points 2, 4, 6, 7, 8 et 9.

***Haldimand Norfolk (No. 6)*** ***105***

**Bonne foi – Reconnaissance de l'agent négociateur**

Le requérant prétendait que l'intimé n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un programme d'équité salariale et d'un système non sexiste de comparaison. Il a invoqué ce qui suit :

1) l'intimé a unilatéralement engagé une firme d'experts-conseils et retenu les services d'un consultant comme porte-parole lors des négociations sans l'accord du requérant;

# Sujets

**Processus d'équité salariale...**

**Négociation...**

2) il a choisi un système et y a investi trop d'efforts et d'argent avant les négociations pour être en mesure de négocier honnêtement;

3) il a invoqué les délais prescrits pour contourner ses obligations en matière de négociations;

4) il a refusé de reconnaître l'agent de négociateur;

5) il a rédigé la version initiale du questionnaire sur l'emploi et a procédé à l'essai-pilote du système sans l'accord du requérant;

6) il a délégué toutes ses responsabilités à l'expert-conseil et n'a pas négocié de façon valable avec le requérant;

7) il a refusé de divulguer des renseignements importants, y compris les résultats de l'essai-pilote, au requérant, ce qui a empêché ce dernier d'évaluer les propositions de l'intimé;

8) il a planifié de mettre en oeuvre un système de comparaison à l'échelle de la municipalité sans négocier avec le syndicat;

9) il a refusé de participer à des discussions rationnelles ou de répondre convenablement aux critiques, aux questions ou aux propositions du requérant.

Le Tribunal a statué que l'intimé avait manqué à son devoir de négociation lorsqu'il a exercé les activités décrites aux points 2, 4, 6, 7, 8 et 9.

***Haldimand Norfolk (No. 6)*** ***105***

**Programme d'équité salariale**

**Entente**

Les négociations entreprises dans le domaine de l'équité salariale entre les représentants de la ville de Pembroke («la Ville») et les représentants de l'Association de police de Pembroke («l'Association») ont abouti à l'adoption d'un mémoire de règlement. Quand la Ville a présenté ce mémoire à la Commission de police de la ville de Pembroke («la Commission»), celle-ci ne l'a pas approuvé. L'Association a soutenu que la Commission était liée par l'entente.

***Pembroke*** ***157***

**Services de révision**

**Compétence**

L'Association de police de New Liskeard («l'Association») s'est plainte que la Commission de police («la Commission») avait enfreint le paragraphe 9 (2) de la *Loi* lorsqu'elle a raccourci la pause-repas d'une employée et lui a demandé de la prendre sur son lieu de travail. L'agent de révision a conclu qu'il n'avait pas la compétence nécessaire pour donner un ordre relativement à une infraction au paragraphe 9 (2), mais il a conclu que le paragraphe 7 (1) et l'alinéa 22 (2) a) de la *Loi* avaient été enfreints et il a donné un ordre en vertu des paragraphes 24 (2) et (3). Dans une décision antérieure [*Commission de police de New Liskeard (no 1)* (1990), 2 P.E.R. 39], le Tribunal a invité les parties à lui présenter des observations sur la marche à suivre appropriée. Le Tribunal a statué que l'agent n'était pas compétent pour traiter de la plainte relative à une infraction au paragraphe 9 (2).

***New Liskeard Board of Police Commissioners (No. 2)*** ***65***

# Sujets


**T.É.S.**

**Audience**

**Cas à première vue**

L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui précisait que certaines catégories d'emplois dans son établissement avaient une valeur comparable. L'intimé a présenté une motion pour que la requête soit rejetée parce qu'elle ne divulgait pas une affaire à première vue. Le Tribunal a rejeté la requête.

***Peterborough*** *86*

**Cas à première vue**

Un groupe d'employées et une autre employée, à titre individuel, ont demandé une audience devant le Tribunal en ce qui concerne le programme d'équité salariale préparé par un agent de révision. Elles prétendaient, dans leurs requêtes, que la catégorie d'emplois à laquelle elles appartenaient avait été sous-évaluée. L'employeur a également demandé de se faire entendre. Au tout début de l'audience, le comité a demandé, de son propre chef, si un des requérants avait établi une cause à première vue dans ses actes de procédure. Le Tribunal a statué qu'une cause à première vue avait été établie.

***Liquor Control Board of Ontario*** *193*

**Compétence**

L'auteur de la requête a contesté le pouvoir d'une agente de révision d'identifier un employeur. L'agente a demandé aux parties de lui présenter des observations sur cette question. Avant que l'agente de révision ait reçu toutes les observations, l'auteur de la requête a demandé au Tribunal, par voie de requête, de déterminer si l'agente de révision avait compétence pour ce faire. La question dont était saisi le Tribunal était la suivante : est-il approprié que le Tribunal tranche la question de la compétence de l'agente de révision. Le Tribunal a statué que la requête était prématurée.

***Thunder Bay Family and Children's Services*** *27*

**Compétence**

L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui l'identifiait comme l'employeur, aux fins de l'équité salariale, des employés compris dans l'unité de négociation représentée par l'intimé, à savoir la section locale 2175 du Syndicat canadien de la fonction publique. Avant le premier jour d'audience, le Syndicat a demandé, par écrit, à l'auteur de la requête et à l'intimé, la Société d'aide à l'enfance («la Société») de produire certains documents. Les parties en question ont refusé de produire ces documents. Les questions dont était saisi le Tribunal étaient les suivantes : le Tribunal a-t-il compétence pour ordonner la production des documents demandés et, dans ce cas, quels documents doivent être produits? Le Tribunal a ordonné la production des documents demandés.

***Kingston and Frontenac Children's Aid Society*** *31*

**Compétence**

Au moment où la requête pour obtenir une audience a été déposée auprès du Tribunal, aucun règlement n'était intervenu et l'agente de révision n'avait pas encore donné d'ordre ni saisi le Tribunal de la question. La question préliminaire consistait à déterminer si le Tribunal avait compétence pour trancher la question. Le Tribunal a statué que la requête était prématurée et décidé, par conséquent, qu'il n'avait pas compétence pour l'entendre.

***St. Michael's Hospital (No. 2)*** *187*

**Compétence**

**Arbitre**

La partie intimée dans le litige dont était saisi le Tribunal lui a demandé de statuer que le litige ne pouvait pas être entendu par un arbitre si l'une ou l'autre des parties n'était pas satisfaite de l'issue de l'audience tenue. Le Tribunal a refusé de rendre cette ordonnance.

***New Liskeard Board of Police Commissioners (No. 1)*** *39*

# Sujets


**T.É.S...**

**Compétence...**

**Charte canadienne des droits et libertés**

Un agent de révision a donné un ordre fondé sur l'article 6 de la *Loi*. Le syndicat constitué partie requérante a demandé une audience devant le Tribunal relativement à cet ordre et a prétendu que l'interprétation de l'article 6 par l'agent enfreignait la *Charte canadienne des droits et libertés* («la *Charte*»). Le Tribunal devait décider s'il était compétent pour entendre la cause relative à la *Charte*. Le Tribunal a statué qu'il était compétent pour entendre l'affaire et appliquer la *Charte* à la *Loi*.

***Parkwood Hospital*** ***178***

**Dépens**

Un groupe d'infirmières qu'emploie l'hôpital qui constitue la partie requérante a contesté le programme d'équité salariale qu'a affiché l'hôpital. Un agent de révision a ordonné à l'hôpital de modifier son programme et de rajuster le taux de catégorie des infirmières autorisées. L'hôpital s'est opposé à cet ordre et a demandé de se faire entendre devant le Tribunal. Deux des infirmières ont demandé au Tribunal d'ordonner à l'hôpital de payer leurs dépens en ce qui concerne la défense de l'ordre de l'agent de révision devant le Tribunal ou, subsidiairement, de nommer un mandataire chargé de les représenter devant le Tribunal ou de nommer le Bureau d'équité salariale («le Bureau») en tant que leur mandataire. Le Tribunal devait décider s'il était compétent pour donner ces ordres. Le Tribunal a statué qu'il n'était pas compétent pour ordonner à l'hôpital de payer les frais juridiques des infirmières. Il a également refusé de nommer un mandataire pour représenter les infirmières ou de nommer le Bureau comme mandataire.

***Hospital for Sick Children*** ***174***

**Justice naturelle**

La requête portait sur l'identification de l'«employeur». À la fin de la plaidoirie de l'intimé, le Tribunal a invité les parties à lui présenter des observations sur les critères ayant servi à résoudre cette question et énoncés dans *Haldimand– Norfolk (no 3)*, (1989), 1 P.E.R. 17. En fait, il a demandé aux parties de déterminer si l'issue de la requête serait différente si le Tribunal changeait son point de mire et tenait compte, exclusivement ou presque, du critère suivant : qui décide des pratiques de rétribution et qui fixe la valeur du travail. L'auteur de la requête a prétendu que l'à–propos et le fond de la question présageaient des risques de préjudice, enfreignaient les principes de justice naturelle et constituaient un excès de pouvoir. Le Tribunal a statué que les allégations de l'auteur de la requête n'étaient pas fondées.

***Porcupine Health Unit (No. 1)*** ***78***

**Nomination d'un mandataire**

Un groupe d'infirmières qu'emploie l'hôpital qui constitue la partie requérante a contesté le programme d'équité salariale qu'a affiché l'hôpital. Un agent de révision a ordonné à l'hôpital de modifier son programme et de rajuster le taux de catégorie des infirmières autorisées. L'hôpital s'est opposé à cet ordre et a demandé de se faire entendre devant le Tribunal. Deux des infirmières ont demandé au Tribunal d'ordonner à l'hôpital de payer leurs dépens en ce qui concerne la défense de l'ordre de l'agent de révision devant le Tribunal ou, subsidiairement, de nommer un mandataire chargé de les représenter devant le Tribunal ou de nommer le Bureau d'équité salariale («le Bureau») en tant que leur mandataire. Le Tribunal devait décider s'il était compétent pour donner ces ordres. Le Tribunal a statué qu'il n'était pas compétent pour ordonner à l'hôpital de payer les frais juridiques des infirmières. Il a également refusé de nommer un mandataire pour représenter les infirmières ou de nommer le Bureau comme mandataire.

***Hospital for Sick Children*** ***174***

# Sujets

**T.É.S...**

**Compétence...**

**Parti pris**

La requête portait sur l'identification de l'«employeur». À la fin de la plaidoirie de l'intimé, le Tribunal a invité les parties à lui présenter des observations sur les critères ayant servi à résoudre cette question et énoncés dans *Haldimand– Norfolk (no 3)*, (1989), 1 P.E.R. 17. En fait, il a demandé aux parties de déterminer si l'issue de la requête serait différente si le Tribunal changeait son point de mire et tenait compte, exclusivement ou presque, du critère suivant : qui décide des pratiques de rétribution et qui fixe la valeur du travail. L'auteur de la requête a prétendu que l'à–propos et le fond de la question présageaient des risques de préjudice, enfreignaient les principes de justice naturelle et constituaient un excès de pouvoir. Le Tribunal a statué que les allégations de l'auteur de la requête n'étaient pas fondées.

***Porcupine Health Unit (No. 1)*** ***78***

**Recours**

**Défaut de négocier de bonne foi**

Le Tribunal a conclu que : 1) l'employeur n'avait pas négocié les composantes d'un système non sexiste de comparaison; 2) il n'avait pas reconnu l'agent négociateur; 3) il n'avait pas divulgué des renseignements; 4) il n'avait pas participé à des échanges francs et éclairés; et 5) il avait proposé un système de comparaison qui ne respectait pas la norme d'impartialité. Le Tribunal devait décider du recours. Le Tribunal a ordonné à l'intimé de négocier de bonne foi et de s'efforcer de convenir, avec le requérant, d'un système non sexiste de comparaison et d'un programme d'équité salariale. Il a ordonné aux deux parties de déposer des propositions dans les 60 jours, de collaborer et de divulguer tous les renseignements concernant les systèmes de comparaison proposés.

***Haldimand–Norfolk (No. 6)*** ***105***

**Révocation des ordres**

L'auteur de la requête a contesté l'ordre de l'agent de révision qui exigeait que l'intimé comble l'écart qui existait entre les congés payés accordés aux membres d'une catégorie d'emplois à prédominance féminine et ceux qui étaient accordés aux personnes appartenant à la catégorie d'emplois à prédominance masculine au moyen d'une prestation en espèces au lieu d'augmenter la durée des congés payés. L'intimé a adopté le point de vue selon lequel le Tribunal ne pouvait révoquer ou modifier l'ordre de l'agent de révision que si cet ordre enfreignait la *Loi* ou était incorrect par rapport à la *Loi*. Le Tribunal a conclu que son rôle ne se limitait pas à décider si l'ordre était incorrect ou s'il enfreignait la *Loi*, et qu'il traiterait de la question originale soulevée par les parties.

***Lady Dunn General Hospital*** ***168***

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## H


*Haldimand-Norfolk (No.1)* (1989), 1 P.E.R. 1 — 29, 189

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## K


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## L


*Lachowski and Federated Mutual Insurance Co.* (1980), 29 O.R.(2d) 273 (Div.Ct) — 177

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## M


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## W


*Wentworth County Board of Education* (1990), 1 P.E.R. 132 184, 215

*Wentworth County Board of Education, Re* (1990), 2 P.E.R. 37 70

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## A


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## C


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s.24 179
s.52 179
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## F


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## H


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s.16 33
s.38 33


## I


*Interpretation Act*, R.S.O. 1980, c.219, s.10 113
*Intervenor Funding Project Act*, 1988, S.O. 1988, c.71 177


## L


*Labour Relations Act*, R.S.O. 1980, c.228 97, 180
s.1 161
s.15 140
s.40 140
s.44 33
s.56 60
s.57 60
s.59(1) 60
s.60(1) 60
s.62 60
s.66 71

# Statutes Referred To


*Labour Relations Act*, R.S.O. 1980, c.228 (cont'd)

s.89 71
s.103 33
s.109 44
s.111 44

## P

*Pay Equity Act*, 1987, S.O. 1987, c.34 3, 10, 26, 91, 96, 113, 114, 176, 179, 211
s.1 59, 97, 143, 170, 215
s.4 12, 112
s.4(1) 183, 188, 216
s.4(2) 183, 188, 214
s.5 12, 112
s.5(1) 183, 188, 214
s.6 5, 12, 51, 83, 112, 170, 179, 194
s.6(1) 183, 188, 212, 214
s.6(5) 183, 188
s.7 4, 12, 49, 58, 68, 98, 112, 154, 194
s.7(1) 183, 188, 217
s.7(2) 183, 188
s.8 97, 139, 155
s.9 38, 40, 67, 97, 154, 172
s.9(3) 212
s.10 54
s.11 12
s.12 12, 112, 183, 188
s.13 4, 12, 112, 154, 172
s.14 4, 12, 28, 46, 54, 112, 158, 179, 200
s.14(1) 183, 188
s.14(2) 183, 188
s.15 5, 46
s.15(7) 197
s.16 28, 46, 51, 83, 163
s.16(4)3 194
s.22 29, 46, 68, 103
s.23 29, 37, 46, 68, 87
s.23(2) 189
s.24 29, 38, 40, 50, 68, 82, 86, 91
s.24(5) 189
s.25 6, 10, 29, 69, 83, 92, 171, 176
s.25(1) 189

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s.29 — 17, 34, 176
s.29(2) — 184
s.30 — 9, 30, 170, 179
s.31 — 43
s.32 — 14, 178
s.32(1) — 184
s.34, 33 — 77

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s.3 — 102
s.15 — 102


## S


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s.5, 14 — 184
s.12 — 34, 45
s.13 — 45
s.23 — 176

# Rules Referred To

## P


Pay Equity Hearings Tribunal, Rules of Practice

| | |
|---|---|
| Rule 1 | 83, 89, 92 |
| Rule 1.02 | 89 |
| Rule 1.03 | 196 |
| Rule 2.04 | 196 |
| Rule 3.01 | 89 |
| Rule 9 | 90 |
| Rule 9.01, 3 | |
| Rule 1.03 | 196 |
| Rule 12 | 12 |
| Rule 13 | 9 |
| Rule 14.01 | 10 |
| Rule 16.01 | 17 |


## R


Rules of Civil Procedure

| | |
|---|---|
| Rule 21.01 | 87 |
| Rule 48.14 | 20 |

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## C


Canadian Paperworkers Union 91
Canadian Union of Public Employees 27, 208
Canadian Union of Public Employees, Local 79 1, 8
Canadian Union of Public Employees, Local 1525 52
Canadian Union of Public Employees, Local 2175 31
Canadian Union of Public Employees, Local 2380 93
Canadian Union of Public Employees, Local 2504 7, 18


## N


New Liskeard Police Association 39, 65


## O


Ontario Nurses' Association 11, 22, 25, 78, 105, 153, 168, 178, 183, 187, 198


## P


Pembroke Police Association 157
Professional Fire Fighter's Association, Local 519 86


## S


Senior Officers' Association of the Timmins Police Force 50, 82

**0016-89 0031-89** The Riverdale Hospital, Applicant v. Canadian Union of Public Employees, Local 79Respondent; Canadian Union of Public Employees, Local 79 Applicant v. The Riverdale Hospital Respondent

**Before:** Janis Sarra, Vice-Chair and Members Bruce Budd and Nicole Leclerc

**Appearances:** Robert J. Atkinson, Jean Rushworth and Lois Cauthers for the Applicant, the Riverdale Hospital; Laura Trachuk, Linda Jewett and Steven David for the Respondent, Canadian Union of Public Employees, Local 79.

**Cite As:** Riverdale Hospital (No. 1) (1990), 2 P.E.R. 1

**Pay Equity Process - Negotiation - Good Faith - Disclosure**

**The Applicant employer objected to a Review Officer's order directing it to disclose the compensation schedules for its non-unionized positions to the Respondent bargaining agent. The issues before the Tribunal were whether the Respondent required the compensation schedules in order to agree upon job classes for the purposes of determining possible male comparisons and whether this information was necessary or relevant to the Respondent's ability to assess the gender neutrality of the proposed comparison systems.**

**The Tribunal ordered disclosure.**

**The obligation to provide and the Tribunal's jurisdiction to order disclosure were determined by the Tribunal in *Cybermedix Health Services Ltd.* (1989), 1 P.E.R. 41. The s. 14 duty to negotiate in good faith includes as part of the bargaining duty the obligation to disclose information necessary or relevant to pay equity negotiations. For instance, such information may be required to determine a bargaining position, to assess the impact of a bargaining proposal, or to identify and agree upon a definition required by the *Act*.**

**Section 13 specifies the component parts of a pay equity plan and includes, under subsec. (1)(b), the identification of all job classes. Section 6(5) requires that where there are no male job classes within the bargaining unit, the parties are required to look throughout the establishment. In this case it is undisputed that one of the bargaining units represented by the union is comprised exclusively of female dominated jobs and that the only possible male comparators will have to be found outside the bargaining unit. Since the Act defines job class as determined by, *inter alia*, those positions which have the same compensation schedule, it is necessary for the union to have compensation information relating to jobs outside the bargaining unit. Disclosure would present no prejudice to the employer and the Respondent has undertaken to keep the disclosed information confidential. Finally, although the information relates to single incumbent positions, it is the salary range and not the actual earnings of the incumbent which the employer is obliged to disclose.**

**Processus d'équité salariale - Négociation - Bonne foi - Divulgation**

**L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui lui ordonnait de divulguer à l'intimé, aux fins de négocier un programme d'équité salariale pour l'unité de négociation qu'il représentait, les grilles de rétribution relatives aux postes non syndiqués. Les questions dont était saisi le Tribunal étaient les suivantes : l'intimé a-t-il besoin de ces grilles de rétribution pour convenir des catégories d'emploi aux fins de définir d'éventuelles catégories d'emplois à prédominance masculine pouvant servir à des fins de comparaison et ces renseignements sont-ils nécessaires ou liés à l'aptitude de l'intimé d'évaluer le caractère non sexiste des systèmes de comparaison proposés?**

**Le Tribunal a ordonné la divulgation de ces renseignements.**

**Dans *Cybermedix Health Services Ltd.* (1989), 1 P.E.R. 41, le Tribunal a traité de l'obligation de fournir des documents et de sa compétence pour ordonner la divulgation de documents. L'obligation de négocier de bonne foi, imposée en vertu de l'article 14, comprend, dans le cadre de la négociation collective, l'obligation de divulguer les renseignements nécessaires ou liés aux négociations engagées dans le domaine de l'équité salariale. Par exemple, ces renseignements peuvent être nécessaires pour prendre position lors des négociations, évaluer les répercussions d'une proposition ou identifier une définition requise par la *Loi* et en convenir.**

**L'article 13 précise les composantes d'un programme d'équité salariale à savoir, notamment, en vertu de l'alinéa (1)b), le repérage de toutes les catégories d'emploi. Le paragraphe 6(5) précise qu'en l'absence de catégories d'emplois à prédominance masculine au sein de l'unité de négociation, les parties sont tenues de faire des recherches dans l'ensemble de l'établissement. Dans le cas présent, il est incontesté qu'une des unités de négociation que représente le syndicat se compose exclusivement d'emplois à prédominance féminine et que les seuls éléments de comparaison à prédominance masculine qui pourraient exister se retrouvent à l'extérieur de l'unité de négociation. Étant donné que la *Loi* précise que la catégorie d'emplois comprend notamment les postes visés par la même grille de rétribution, il est nécessaire que le syndicat obtienne des renseignements en matière de rétribution relatifs aux postes non compris dans l'unité de négociation. La divulgation de ces renseignements ne porte pas atteinte à l'employeur et l'intimé s'est engagé à respecter le caractère confidentiel des renseignements divulgués. Finalement, bien que les renseignements aient trait à des postes occupés par une seule personne, l'employeur n'est tenu de divulguer que le taux de salaire et non le salaire réel du titulaire du poste.**

## DECISION OF THE TRIBUNAL, FEBRUARY 16, 1990

1. Tribunal File 0016-89 is an application for hearing in which the Applicant, The Riverdale Hospital (the "Hospital") objects to an order made by a review officer directing the Hospital to provide the Respondent, the Canadian Union of Public Employees Local 79 ("CUPE" or the "Union") with the compensation schedules of the non-unionized positions for the purpose of pay equity negotiations. The

parties settled all other issues of disclosure prior to the first day of hearing. The Union has also filed an application for enforcement of the same order (File No. 0031-89). The two matters were listed together for hearing. The parties agreed at the pre-hearing conference that the files would be heard sequentially, with evidence from file 0016-89 to be applied to file 0031-89. The panel accepted that arrangement and proceeded on that basis. At the completion of the hearing of file 0016-89, the panel reserved and this decision pertains only to the issues in file 0016-89.

2. The parties made submissions to the Tribunal with respect to the issue of legal onus. It is not necessary to decide the question of legal onus in disposing with the merits of this case and accordingly, we do not do so.

*THE FACTS AND ISSUES*

3. The issue before us is whether the review officer's order of disclosure should be confirmed or revoked. Arising out of that was a limited question as to the Tribunal's jurisdiction to order disclosure for job information outside of the bargaining unit. In assessing disclosure, there were two issues in dispute. First, does the Union require the compensation schedules in order to agree upon job classes which will form the basis of possible male job class comparators? Secondly, is the compensation information either necessary or relevant to the Respondent's ability to assess the gender neutrality of the comparison systems proposed in these pay equity negotiations?

4. The facts are not in dispute. The Applicant is a chronic care hospital, governed by the provisions of the *Public Hospitals Act* , R.S.O. 1980, c. 410. The Union represents two bargaining units at the Hospital, one consisting of nursing and paramedical staff, and the other consisting of service workers. The parties agree that there are no male comparators within the nursing and paramedical unit. There are also three other unionized groups at the Hospital, as well as a non-unionized or "excluded" group of employees who are largely comprised of managerial personnel.

5. The parties began exchanging correspondence on pay equity negotiations in February 1988 and commenced face-to-face bargaining in June 1989. There are two concurrent sets of pay equity negotiations for the two CUPE bargaining units. To date the Hospital has provided information on the job titles and gender composition of all jobs; as well as the job descriptions where they are available, for all positions in the establishment. It has provided wage and benefit data for the unionized jobs only. The Hospital has tabled a proposed system of comparison entitled "Job Evaluation Manual for Use by Member Hospitals of the Ontario Hospital Association provided by Stevenson, Kellogg, Ernst and Whinney." The Union has tabled a proposed comparison system entitled "Draft Metropolitan Toronto Local 79 Pay Equity Job Comparison System", a system it is in the process of developing with the Municipality of Metropolitan Toronto. Both systems are "a priori point factor" systems; although CUPE's proposed system is being developed and has no weights as yet. Both parties have tabled their respective proposals for both bargaining units concerned. The parties have agreed upon a questionnaire which has been jointly developed and have agreed upon an interviewing process to collect the job content information; the process of data collection is scheduled to start early in 1990. To date, the parties have not agreed upon the definition or identification of job classes.

6. The Union applied to Review Services on August 30, 1989. Subsequently, on October 4, 1989, a review officer of the Pay Equity Commission issued the following order to the parties:

> I order the Employer to disclose to the Union forthwith the compensation schedules for all positions outside the bargaining units; this includes but is not limited to the current salary ranges for non-unionized positions. I further direct the parties to resume pay equity negotiations.

7. The Applicant seeks to have the order revoked, submitting that it should not be required to provide the Respondent with any compensation schedules relating to non-unionized positions. It believes the information is not necessary to determine job class of potential male comparators; that only job content information is required to select male job class. In the alternative, it challenges the Union's right to negotiate job classes that would form part of another pay equity plan. The Applicant believes the information is also not necessary to test the gender neutrality of the proposed comparison system. It called opinion evidence that such information has not been historically used in traditional job evaluation methodologies. The Applicant submitted that even if compensation information is needed to test gender neutrality, the wage information of the other unionized groups not represented by CUPE was sufficient to do the testing. Further, the Hospital was concerned about the confidentiality it believes it owes to the large number of excluded positions held by single male incumbents with respect to the salaries they are receiving. In the alternative, it requests the Tribunal not to order information for the Executive Director position, since the Union admitted in evidence that this job is not a possible male comparator.

8. The Respondent asks the Tribunal to confirm the order; alleging that the Hospital is bargaining in bad faith in refusing to disclose the compensation schedules necessary to enable the parties to engage in informed pay equity negotiations. The Union believes it requires the information to consider, define and identify job classes or possible groups of jobs that might be potential male comparators for the female job classes within its bargaining unit. The Union submitted that the Hospital can undertake impact testing for gender neutrality prior to agreeing to either system and that the Union should be entitled to the same information to enable it to undertake the same process as effectively. The Union led evidence describing the types of tests it sought to undertake to assess the gender neutrality of both proposed comparison systems. The Union has approached the pay equity bargaining on the assumption that wages in its bargaining units have been historically undervalued because of systemic gender discrimination, and that the Union has an obligation to seek the best redress consistent with the *Pay Equity Act, 1987*. The Union believes it is not in a position to make any further progress in pay equity negotiations without the compensation information of the excluded positions.

9. The Tribunal heard of the evidence of Ms. Lois Cauthers, Director of Personnel for the Hospital, and Ms. Linda Jewett, CUPE National Representative responsible for pay equity negotiations for these two bargaining units. The Tribunal also received the opinion evidence of Mr. Robert McDowall who was qualified as an expert in traditional job evaluation on the basis of his skills, knowledge and experience. The Union objected to the summary of his proposed evidence as required by Rule 9.01 of the Tribunal's Rules of Practice. Given the early stages of application of the rule, the Tribunal was prepared to accept the summary in this case. The purpose of the rule is to prevent surprise, and to allow preparation of cross-examination as well as preparation of a party's own witnesses. Given the nature of evidence expected from an expert, notice is especially required. As a general policy matter, a summary should include an outline of the issues the witness seeks to give evidence on; the conclusions she or he has formulated; and the basis or reasoning underlying each of the conclusions. With respect to the evidence given by Mr. McDowall, although we found him to be a forthright witness, his evidence was not particularly useful in the pay equity issues the Tribunal must decide in this case.

*DECISION*

10. Section 7(1) of the *Pay Equity Act, 1987* requires employers to "establish and maintain compensation practices that provide for pay equity in every establishment of the employer" and the *Act* further requires that no employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would contravene Section 7(1). Section 14 of the *Act* imposes a joint obligation upon the employer and a bargaining agent to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and a pay equity plan; such an obligation applies both to the process and to the content of pay equity negotiations. In bargaining the component parts of a job comparison system and a pay equity plan, the parties must meet the statutory requirements of the *Act*.

11. The duty to disclose information in the context of bargaining for a collective agreement is well established in labour relations jurisprudence. The bargaining duty includes an obligation to provide the information necessary to foster rational, informed discussion and to prevent either party from negotiating in the "dark". (see: *DeVilbiss (Canada) Limited*, [1976] O.L.R.B. Rep. March 49; *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)* [1985] O.L.R.B. Rep. May 705; *The Windsor Star*, [1983] O.L.R.B. Rep. Dec. 2147; *Globe Spring & Cushion Co. Ltd.* [1982] O.L.R.B. Rep. Sept. 1303; *Forintek Canada Corp.* [1986] O.L.R.B. Rep. Apr. 453). Although the disclosure requirement in the context of bargaining for a collective agreement is not directly analogous, there are useful elements to apply in the pay equity context. The Tribunal has the jurisdiction under the *Pay Equity Act, 1987* to order disclosure and it has done so as part of its jurisdiction to deal with complaints of bad faith bargaining. In *Cybermedix Health Services Ltd.* (July 6, 1989), 0003-89 (P.E.H.T.)[now reported at 1 P.E.R. 41], the Tribunal said at paragraphs 20 and 24:

> 20. Disclosure is required to foster rational and informed discussions and to enable the parties to move towards settlement. The parties must have sufficient information to intelligently appraise the other's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members...
>
> 24. Disclosure must be made when parties cannot agree on an issue without the information requested. Both parties are entitled to sufficient information to make informed choices at all stages of the process.

The Section 14 duty to negotiate in good faith includes, as part of the bargaining duty, the obligation to disclose information necessary or relevant to pay equity negotiations. In the process of negotiating a gender neutral comparison system and a pay equity plan, the parties must disclose sufficient information to ensure that rational and informed discussion can take place. With respect to disclosure requirements in the context of pay equity negotiations, the requested information may be required to determine a bargaining position or it may be related to the ability of one party in the negotiation process to assess the impact of a bargaining proposal. Disclosure is also necessary where the parties must have the information in order to identify and agree upon a definition statutorily required by the *Act*.

12. The information requested in the context of pay equity negotiations must be rationally related and relevant to an issue in the process. What is rationally relevant to pay equity? Section 13 of the *Act* specifies the component parts of a pay equity plan, which in a unionized workplace, must be negotiated and agreed upon. Subsection 13(1)(b) requires the identification of all job classes which form the basis of comparisons

required by the *Act*. Where there are no male job classes within the bargaining unit, the parties are required to look throughout the establishment. Subsections 6(4)(a) and 6(5) of the *Act* state:

> 6(4) Comparisons required by this Act
>
> (a) for job classes inside a bargaining unit, shall be made between job classes in the bargaining unit; and...
>
> 6(5) If, after applying subsection (4), no male job class is found in which the work performed is of equal or comparable value to that of the female job class that is the subject of the comparison, the female job class shall be compared to male job classes throughout the establishment.

In this case, one of the two bargaining units is comprised of exclusively female dominated jobs. It is undisputed that the only possible male comparators will have to be found outside the bargaining unit. The parties will have to compare the female job classes in the nursing and paramedical unit to male job classes throughout the establishment as required by subsection 6(5) of the *Act*. The Employer and the Union must be able to identify and determine the job classes as required by Section 13(1)(b).

13. We accept the submission of Counsel for the Hospital that the Union cannot negotiate job classes for the purpose of another pay equity plan. Section 15(3) of the *Act*, in requiring an employer to prepare a pay equity plan for its non-unionized employees, specifies:

> 15.(3) An agreement under section 14 between an employer and a bargaining agent shall not affect any pay equity plan required by this section or subsection 14(8).

However, the *Act* requires the parties to compare the female job classes to male job classes throughout the establishment where there are no male comparators within a bargaining unit and the Union can agree with the Employer on male job classes for this purpose. It may be that the male job class ultimately agreed upon by these parties for purpose of comparison with female job classes and the pay equity plan of these bargaining units is not the same job class arrived at for other purposes. In cases where the parties have agreed on job classes, the agreement cannot be binding on another pay equity plan. Whatever decision on job class is negotiated for purpose of male comparators will not bind the negotiation of job class with other bargaining agents, nor will it bind the Employer in defining job class for the purposes of its non-union plan.

14. Is it necessary to have compensation information of jobs outside the bargaining unit in order to identify possible male comparators for the female job classes within the bargaining unit? The *Act* defines job class as:

> Job class means those positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates;

The wording requires four criteria to be assessed in deciding job class. The definition of job class does not require any order of assessing the four factors; it only specifies that all four criteria must be considered. We do not accept the submission of the Applicant Counsel that disclosure of the fourth criteria of "same compensation schedule, salary grade or range of salary grades" is necessary only after the first three have been disclosed and found to be the same or similar.

15. In order to determine a bargaining position and to assess the position of the Employer on what constitutes a job class, the Union must have information on the four criteria upon which job class is defined

by the statute. The compensation schedule, salary grade or range of salary rates is one of four criteria that both parties must apply in determining and agreeing upon the contours of a job class. The fact that the majority of jobs outside the bargaining unit are single incumbent positions does not preclude the parties from agreeing that several jobs constitute a job class given the statutory definition.

16. We find that the Union is entitled to the compensation schedule relating to the positions outside of the bargaining unit in order to formulate its bargaining position and in order to negotiate the male job classes which are to be used as comparisons for purposes of the gender neutral comparison system and the pay equity plan in these bargaining units. The disclosure of this information is essential to ensuring a rational and informed process of pay equity negotiations, consistent with the requirements of the *Act*.

17. The Tribunal heard considerable evidence and received very thoughtful submissions on whether the compensation information is necessary or relevant to test the gender neutrality of the proposed comparison systems. There is no caselaw to date which establishes the legal standard of gender neutrality. Nor are there established tests for such standards of gender neutrality under the *Act*. In such a context, it is essential that parties be given latitude in their efforts to satisfy themselves that their bargaining position meets their obligations under the *Act*. Both parties must assure themselves that a proposed comparison system is applicable to the particular workplace and that there is not a gender effect. However, the Tribunal finds that parties are entitled to disclosure of compensation schedules in order to identify and agree upon the job classes as one of the four criteria required by the *Act*. Given that, it is unnecessary in this case to decide whether the information is needed to test for gender neutrality and accordingly, we do not do so.

18. In conclusion, we find that there is no prejudice to the Employer in ordering this information for the purpose of determining job classes. With respect to the issue of confidentiality, we note that there is both an implied and an explicit undertaking by the Union that the information will not be used for purposes other than the negotiation of pay equity. Although there are single incumbent positions, it is the salary range for each position, not the actual earnings of the incumbent which the Employer is obliged to disclose.

19. Based upon the evidence and submissions, the Tribunal finds that the Applicant must disclose to the Respondent information necessary to the pay equity negotiation process, in particular that it must disclose the requested compensation information relating to the non-unionized positions in this establishment. In light of the fact the Union conceded in evidence that the Executive Director was not a possible male comparator, there is no reason to give the compensation information for that position and accordingly, we vary the order of the review officer. Therefore, pursuant to Sections 25(2)(d)and 25(2)(g) the Tribunal hereby orders the Hospital to disclose to the Union the compensation schedule, salary grade or range of salary rates relating to the managerial and non-unionized jobs, except that of the Executive Director, and the Tribunal orders the parties to continue pay equity negotiations.

**0037-89** Nepean Public Library Board Applicant v.Canadian Union of Public Employees and its Local 2504 and The Corporation of the City of Nepean Respondents

**Before:** Patricia Hughes, Vice-Chair, and Members Sharon Laing and Susan Genge

**Cite As:** Nepean Public Library Board (No. 1) (1990), 2 P.E.R. 7

**Practice and Procedure - Adjournments**

The parties agreed to adjourn the application *sine die* and that none of them would bring it back on for hearing until after the release of the Ontario Court of Appeal decision in *Re Haldimand-Norfolk and Ontario Nurses' Association* (1989), 1 P.E.R. 188 (Div. Ct.); leave to appeal granted April 17, 1990 (Ont. C.A.). An adjournment *sine die* was requested and the issue before the Tribunal was whether to grant it.

The Tribunal adjourned the matter and advised the parties that unless one of them requested otherwise, it would terminate the matter one year, subject to any objections the parties might have about this proposed procedure.

Adjournments *sine die* are a useful mechanism for permitting parties to keep a complaint or application alive while they attempt to reach a settlement. Should they fail in this regard, they may return to the decision maker without going through any prior procedures. Such adjournments are to the advantage of the Tribunal because they free up dates and personnel which have otherwise been reserved for the case. The Tribunal also has an interest in knowing the state of its caseload and the status of matters before it. It is desirable that the Tribunal place some finite limit on an adjournment *sine die*, and it is not unreasonable that this limit normally consist of one year.

**Pratique et procédure - Ajournements**

Les parties ont convenu d'ajourner indéfiniment la requête et de ne pas demander d'audience tant que la Cour d'appel de l'Ontario n'aurait pas rendu sa décision dans l'affaire *Haldimand-Norfolk et l'Association des infirmières et infirmiers de l'Ontario* (1989), 1 P.E.R. 188 (Cour div.). L'autorisation d'interjeter appel a été accordée le 17 avril 1990 (Cour d'appel de l'Ontario). L'auteur de la requête et l'intimé ont convenu de demander un ajournement indéfini de l'audience. La question dont était saisi le Tribunal était la suivante : doit-il donner suite à la demande d'ajournement?

Le Tribunal a ajourné l'affaire et a informé les parties que sauf demande contraire, il y mettrait fin dans l'année, sous réserve des objections que les parties pourraient avoir en ce qui concerne ce projet de marche à suivre.

L'ajournement indéfini constitue un mécanisme utile pour permettre aux parties de maintenir une plainte ou une requête pendant qu'elles continuent d'en arriver à un règlement. Si elles n'y arrivent pas, elles peuvent se présenter à nouveau devant le décisionnaire sans suivre les règles préalables de procédure. Ces ajournements profitent aussi au Tribunal parce qu'ils libèrent les dates et le personnel réservés à l'audition de l'affaire. Le Tribunal a également intérêt à connaître sa charge de travail et l'état des affaires qu'il doit entendre. Il est souhaitable que le Tribunal prescrive la durée des ajournements indéfinis et il n'est pas déraisonnable que cette limite soit normalement fixée à un an.

## DECISION OF THE TRIBUNAL, FEBRUARY 20, 1990

1. The Corporation of the City of Nepean ("the City") is added to the style of cause as Respondent.

2. Nepean Public Library Board ("the Library") requested a hearing with respect to certain issues arising out of an order made by a Review Officer ("the application").

3. Before the scheduled hearing into the application, the parties reached an agreement reflected in Minutes of Agreement dated January 10, 1990. In part, the parties decided to proceed on the following basis:

> The matter involving the above parties at the Pay Equity Hearings Tribunal will be adjourned sine die with either or any Party able to bring it back on for hearing by giving the Pay Equity Hearing Tribunal the appropriate notice after the date of release of the Ontario Court of Appeal's decision in the Pay Equity case before it in the matter between the Ontario Nurses' Association and The Regional Municipality of Haldimand-Norfolk and others. This Agreement is subject to the ratification of these minutes of settlement [sic] by the Nepean Public Library Board and the Council of the City. The undersigned representatives of the Board and The City will recommend acceptance of this Agreement to their respective principals.

4. By letters dated January 28, 1990 and February 1, 1990, the Tribunal was advised that the Library Board and the City had ratified the agreement.

5. The agreement clearly envisages that the parties may return to the Tribunal at any time in the future. Taken literally, indeed, the provision in the agreement merely states that the parties will not come back until

after the Court of Appeal's decision issues; the restriction that is set applies only to the period prior to the issuance of the decision and there is no restriction on how long may pass before any party seeks to bring the matter on for hearing.

6. Adjournments *sine die* are a useful mechanism for permitting parties to keep a complaint or application alive while they attempt to settle the issues involved in their dispute; should they fail to settle the dispute completely, they may return to the decision-maker without going through any prior procedures, including filing new applications or responses or, in the case of the Tribunal, going through Review Services. By their very name, adjournments *sine die* are adjournments to a time which is not fixed. Very often, such adjournments are the last an adjudicative body sees of the complaint. That is to the advantage of the tribunal because it permits it to free up dates and the panel which may have been reserved to this particular case.

7. The Tribunal also has an interest in knowing the state of its caseload and the status of matters before it. At some point, the parties should be required to put their minds to how they wish to proceed. It is desirable to place some finite limit on an adjournment *sine die* which means only that the parties have adjourned to an unspecified time, not to a time which could occur between this date and some date in infinity. It is not unreasonable that this limit normally consist of one year: thus if neither party seeks to bring on a matter which has been adjourned *sine die* before the expiry of a year after the granting of the adjournment, the matter will be terminated after the expiry of the year.

8. Accordingly, unless we hear from the parties with an objection to this manner of proceeding and their reasons for such objection, within 21 days from the date hereof, we shall dispose of this matter as follows:

> This matter will be adjourned *sine die*. Should neither of the parties request that the matter be brought on for hearing before the expiry of a year from the date hereof, it will be terminated by the Tribunal.

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**0016-89** The Riverdale Hospital Applicant v. Canadian Union of Public Employees, Local 79 Respondent

**Before:** Janis Sarra, Vice-chair and Members Nicole Leclerc and Bruce Budd

**Cite As: Riverdale Hospital (No. 2)** (1990), 2 P.E.R. 8

**Practice and Procedure - Reconsideration**

**The Applicant requested the Tribunal to reconsider its decision ordering the Applicant to disclose certain information to the Respondent.**

**The Tribunal declined to reconsider.**

**Section 30(2) of the *Act* gives the Tribunal jurisdiction to reconsider a decision; however, under s. 30(1) the decisions of the Tribunal are meant to be final and conclusive. In light of this, in *Women's College Hospital (No.2)* (1989), 1 P.E.R. 178, the Tribunal determined that the discretion to reconsider a decision ought to be exercised only where compelling and extraordinary circumstances make it appropriate to do so. The factors relevant to the determination of whether to reconsider an earlier decision are: (1) is there evidence or legal submissions that was unavailable at the time of the original decision; and (2) was the original decision wrong in law? The Applicant here submitted that the Tribunal was wrong in law in failing to adopt the Ontario Labour Relations Board's jurisprudence respecting disclosure. The Tribunal is not bound by the tests developed by another administrative tribunal for a different statutory purpose. It is free to develop its own tests and and finds no error in its decision to do so or in its application of those tests.**

**Pratique et procédure - Réexamen**

**L'auteur de la requête a demandé au Tribunal de réexaminer sa décision de lui ordonner de divulguer certains renseignements à l'intimé.**

**Le Tribunal a refusé de procéder à un réexamen.**

**Le paragraphe 30(2) de la *Loi* donne au Tribunal le pouvoir de réexaminer une décision. Toutefois, en vertu du paragraphe 30(1), les décisions du Tribunal sont définitives et ont force de chose jugée. Voilà pourquoi, dans *Women's College Hospital***

*(no 2)* (1989), 1 P.E.R. 178, le Tribunal a conclu qu'il ne devait exercer son pouvoir de réexaminer une décision que si des circonstances extraordinaires le justifiaient. Le Tribunal applique les facteurs suivants pour déterminer s'il réexaminera une décision antérieure : (1) existe-t-il des éléments de preuve ou des observations juridiques qui n'étaient pas disponibles au moment où la décision originale a été rendue; (2) la décision originale est-elle fondée sur une erreur de droit? L'auteur de la requête soutenait que le défaut du Tribunal de ne pas adopter le corps de jurisprudence établi par la Commission des relations de travail de l'Ontario en matière de divulgation constituait une erreur de droit. Le Tribunal n'est pas lié par les tests élaborés par un autre tribunal administratif à d'autres fins juridiques. Il est libre d'élaborer ses propres tests et ne trouve pas que sa décision de ce faire ou que son application de ces tests soit erronée.

## DECISION OF THE TRIBUNAL, MARCH 29, 1990

1. The Tribunal received a request for reconsideration dated February 26, 1990 in which Counsel for the Applicant asked the Tribunal to reconsider its unanimous decision of February 16, 1990.

2. Section 30(1) of the *Act* provides the Tribunal with exclusive jurisdiction to determine all questions of fact or law arising in any matter before it, specifying that decisions are final and conclusive. Decisions of the Tribunal assist the parties to fulfill their obligations under the *Act* by providing a sense of finality, consistency and certainty. The statute provides the Tribunal with jurisdiction to reconsider a decision; however reconsideration is at the discretion of the Tribunal and is not an automatic right of the parties. Section 30(2) specifies:

> 30.-(2) The Hearings Tribunal may at any time, if it considers it advisable to do so, reconsider a decision or order made by it and vary or revoke the decision or order.

Rule 13 of the Tribunal's Rules of Practice provides that parties may request reconsideration and specifies that the Tribunal may reconsider any decision on the basis of the written submissions. In seeking reconsideration, parties must include in their application, written submissions with the basis upon which reconsideration is sought. In this case the Tribunal requested written submissions; in the future the Tribunal expects that the basis or reasons for which reconsideration is sought will be included as part of the initial application.

3. The Tribunal has adopted an approach to reconsideration which includes some of the principles developed by the Ontario Labour Relations Board; specifically that the Board will not generally reconsider a decision unless a party proposes to adduce new evidence or present new argument which could not previously have been presented, and which if presented, would be practically conclusive (see *Canadian Union of General Employees* [1975] OLRB Rep. April 320). The Hearings Tribunal dealt with the issue of reconsideration in *Women's College Hospital* (No. 2) I P.E.R. 178 at paragraph 7:

> In our view, the Tribunal's discretion to reconsider a decision ought to be exercised only where there are compelling and extraordinary circumstances which make it appropriate to do so. To hold otherwise would be to jeopardize the Tribunal's goal of bringing finality to matters in an expeditious manner.

4. The panel adopts these general principles. The purpose of a reconsideration application is not to allow parties to re-argue their case, rather it is a recognition that there may be extraordinary circumstances which make it appropriate to reconsider a decision which was intended to be final. In particular there may be evidence or legal submissions that a party could not possibly have raised during the hearing, or there could be a concern that the Tribunal erred in law in reaching its decision. These parties sought resolution of a specific issue in dispute during pay equity negotiations, first through the Review Services process and then through the adjudicative process before the Tribunal. The Tribunal ordered disclosure of the requested compensation information and ordered the parties to continue pay equity negotiations. The parties are entitled to certainty arising out of the Tribunal decision so that they can proceed to complete their

obligations under the *Pay Equity Act, 1987*. Any request for reconsideration must be made on the basis that there are compelling and extraordinary circumstances which make reconsideration appropriate.

5. In considering whether to exercise our discretion to reconsider a decision which was intended to be final, the Tribunal has considered two factors:

1. Is there evidence or legal submissions which could not have been presented by the party seeking reconsideration at the time of the hearing and which, if accepted, would be practically conclusive in changing the outcome of the case?

2. Is the decision wrong in law?

With regard to the first factor, the Applicant has made no representation that there is new evidence or legal submissions that were unavailable at the time of the hearing. The submissions in the Applicant's request for reconsideration were made or could have been made at the time of the hearing and there is no need for the Tribunal to reconsider on these grounds. The Applicant seeks reconsideration on the basis that the Tribunal erred in law by not adopting a particular line of disclosure jurisprudence of the Ontario Labour Relations Board represented by the *Royal Conservatory of Music* [1985] OLRB Rep. Nor. 1652. We respectfully disagree. The Tribunal is free to determine its own tests for disclosure in the context of the *Pay Equity Act, 1987* and it is clearly not bound by the tests developed by another Tribunal for a different statutory purpose. The Tribunal carefully considered all of the relevant case law in determining what tests it would adopt. It endorsed the approach of the Hearings Tribunal in *Cybermedix Health Services* (1989), 1 P.E.R. 41. The Tribunal then applied these tests to the circumstances of this case to reach its decision. Neither the adoption of tests for the purpose of the *Pay Equity Act, 1987* nor the application of those tests to the facts in this case constitute an error in law, and accordingly, the Tribunal will not reconsider.

6. The Applicant asks in the alternative, that the Tribunal vary the remedy ordered, a variance it characterizes as a "refinement in the remedy". The submissions with respect to confidentiality were presented at the hearing; the remedy now proposed is one which could have been been requested initially and was not. There have been no subsequent developments which might make the remedy ordered inappropriate. Accordingly, the Tribunal will not reconsider its decision. We reiterate that it is the salary range of the positions rather than the salaries of individuals which have been ordered to be disclosed. Our reasons in finding an obligation to disclose were fully articulated in the February 16, 1990 decision and we see no reason to repeat them here.

7. In conclusion, the Tribunal finds there is no reason to interfere with a decision which was intended to be final and accordingly, we are not persuaded to reconsider our decision of February 16, 1990 which ordered at paragraph 19:

> Therefore, pursuant to Sections 25 (2)(d) and 25 (2)(g) the Tribunal hereby orders the Hospital to disclose to the Union the compensation schedule, salary grade or range of salary rates relating to the managerial and non-unionized jobs, except that of the Executive Director, and the Tribunal orders the parties to continue pay equity negotiations.

8. Pursuant to the Respondent's request and pursuant to Rule 14.01 of the Tribunal's Rules of Practice, the Registrar will file a certified copy of the decision with the Office of the Registrar of the Supreme Court of Ontario.

**0008-89 0011-89 0018-89 0029-89 0034-89 0036-89** Ontario Nurses' Association Applicant v. Women's College Hospital Respondent; Women's College Hospital Applicant v. Ontario Nurses' Association Respondent; Ontario Nurses' Association Applicant v. Sunnybrook Medical Centre Respondent; Ontario Nurses' Association Applicant v. North York General Hospital Respondent; Sunnybrook Medical Centre Applicant v. Ontario Nurses' Association Respondent; North York General Hospital Applicant v. Ontario Nurses' Association Respondent

**Before:** Raphael Palumbo, Vice-Chair and Members Susan Genge and Sharon Laing

**Cite As: Women's College Hospital (No. 3) (1990), 2 P.E.R. 11**

## Practice and Procedure - Intervention

Women's The Aplicant Union alleged that the Respondent Hospitals had failed to bargain in good faith and to endeavour to agree upon a gender neutral comparison system contrary to s. 14 of the *Act*. The Hospitals counterclaimed against the Union on the same grounds. The claims and counter-claims in respect of each workplace were consolidated, and the three consolidated hearings were ordered to be heard together. PMSK, a job evalution consulting company, applied to intervene, claiming that it had an interest in the subject matter of the proceedings.

The Tribunal dismissed PMSK's application to intervene as a party.

PMSK is not entitled to intervene as a party pursuant to the provisions of the *Act*. PMSK is a consulting firm retained by the Hospitals to assist them in the preparation of their pay equity plans. It does not fall within s.32(1), and therefore is not a party pursuant to the *Act*. Neither is PMSK entitled by law to participate in these proceedings pursuant to s. 5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484. The issue in this case is not the gender neutrality of PMSK's job evaluation plan in general. According to the terms of the *Act*, the Tribunal's mandate is not to adjudicate upon the plan marketed by PMSK, but rather the gender neutrality of the proposals put forward by the Hospitals regarding a comparision system in those particular workplaces. PMSK does not have an interest in this issue. Even though the decision may have, as PMSK claims, a material, direct and significant financial effect on it, the Tribunal rejects commercial interest as a basis for intervention. The addition of PMSK would lengthen the proceedings. In weighing all of the criteria the Tribunal finds that PMSK ought not to be afforded party intervenor status.

## Tribunal member Sharon Laing Dissented:

The issues in this hearing are broader than a dispute between one employer and one bargaining agent. The union has attacked the job evaluation system as fundamentally flawed. The case thus goes beyond the nature of a *lis inter partes* and relates to a system which will form the basis of many pay equity plans across the province. The practical reality is that this case will not only deal with the proposals of these employers but by necessary inference the job evaluation plan relied upon irrespective of the terms of the legislation. While PMSK's commercial interest in the litigation is not a sufficient basis on which to grant intervenor status, it may be preferable for the Tribunal to receive evidence respecting the plan from PMSK itself. I am not persuaded that the proposed intervention would add unreasonably to the length of the proceedings.

## Pratique et procédure - Intervention

L'auteur de la requête, le syndicat, a prétendu que l'intimé, à savoir les hôpitaux, n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un système de comparaison non sexiste contrairement à l'article 14 de la *Loi*. Les hôpitaux ont déposé une demande reconventionnelle à l'encontre du syndicat en faisant valoir les mêmes raisons. Les demandes et demandes reconventionnelles relatives à chaque lieu de travail ont été réunies et il a été ordonné que les trois audiences réunies soient entendues ensemble. La société d'experts-conseils en matière d'évaluation des emplois, PMSK, a demandé le droit d'intervenir en faisant valoir qu'elle avait un intérêt dans l'instance.

Le Tribunal a rejeté la requête de PMSK en intervention.

PMSK n'a pas le droit d'intervenir à titre de partie conformément aux dispositions de la *Loi*. PMSK est une société d'experts-conseils que les hôpitaux ont engagée afin de les aider à préparer leurs programmes d'équité salariale. La société d'experts-conseils n'est pas visée par le paragraphe 32(1) et n'est pas, par conséquent, une partie aux termes de la *Loi*. De plus, PMSK n'a pas le droit juridique de participer à l'instance conformément à l'article 5 de la *Loi sur l'exercice des compétences égales*, qui constitue le chapitre 484 des L.R.O. de 1980. Le point en litige n'est pas le caractère sexiste ou non sexiste du programme d'évaluation des emplois de PMSK en général. Selon la *Loi*, le mandat du Tribunal n'est pas de prendre une décision en se fondant sur le plan commercialisé par PMSK, mais en tenant compte plutôt du caractère sexiste ou non sexiste des propositions des hôpitaux relativement à un système de comparaison visant les lieux de travail en question. PMSK n'a pas d'intérêt dans cette affaire. Même si la décision peut avoir, comme le prétend PMSK, des répercussions directes et importantes au point de vue financier, le Tribunal rejette l'intérêt commercial comme motif d'intervention. La jonction de PMSK allongerait l'instance. Lorsqu'il étudie tous les facteurs, le Tribunal conclut que la société PMSK ne devrait pas être jointe à titre d'intervenant.

## Dissentiment de Sharon Laing, membre du Tribunal :

Les questions soulevées dans la présente affaire sont plus générales qu'un conflit entre un employeur et un agent négociateur. Le syndicat considère le système d'évaluation des emplois comme fondamentalement faussé. L'affaire va au-delà de la nature d'un litige entre parties et a trait au système qui sous-tendra de nombreux programmes d'équité salariale dans la province. La réalité pratique est la suivante : cette affaire ne portera pas seulement sur les propositions de ces employeurs mais inévitablement sur le programme d'évaluation des emplois utilisé, peu importe le contenu de la loi. Même si l'intérêt commercial de PMSK ne

**constitue pas un motif suffisant pour lui accorder la qualité d'intervenant, il peut être préférable pour le Tribunal de recevoir des preuves concernant le programme directement de PMSK. Je ne suis pas persuadée que la jonction de PMSK comme intervenant allongerait indûment l'instance.**

## DECISION OF THE TRIBUNAL, APRIL 12, 1990

1. This is an application by Peat Marwick Stevenson & Kellogg ("PMSK", formerly Stevenson Kellogg Ernst & Whinney, "SKEW"), to intervene in these proceedings. Written submissions were filed by PMSK, the Ontario Nurses' Association ("ONA"), Sunnybrook Medical Centre ("Sunnybrook") and North York General Hospital ("North York"). On January 19, 1990, we issued a decision which refused status to PMSK to participate in these proceedings. These reasons follow.

2. ONA filed an Application (Tribunal File No. 0018-89) alleging that the Respondent, Sunnybrook Medical Centre has acted contrary to the *Pay Equity Act, 1987*, S.O. 1987, c. 34 (the "Act"), and in particular has proposed a comparison system which is gender-biased, has refused to negotiate terms of reference for the process of joint negotiations as required under the *Act* and has failed to disclose the necessary information required to ensure meaningful negotiations to achieve pay equity. ONA alleges that Sunnybrook has breached sections 4(2), 5(1), 6, 7, 11, 12, 13, and 14.

3. Sunnybrook has filed an Application (Tribunal File No. 0034-89) alleging that ONA has failed to negotiate in good faith and endeavour to agree on a gender-neutral comparison system and a pay equity plan for the bargaining units it represents, contrary to the provision of section 14(2) of the *Act*.

4. Application Numbers 0018-89 and 0034-89 were consolidated pursuant to Rule 12 of the Tribunal's Rules of Practice.

5. ONA has also filed a complaint against North York General Hospital (Tribunal File No. 0029-89) alleging that the Respondent, North York, has failed to negotiate in good faith and endeavour to agree on a gender-neutral comparison system and a pay equity plan for its bargaining units. Further, ONA alleges that North York has proposed a gender-biased comparison system and pay equity plan, has failed to negotiate and agree on proper terms of reference to guide and ensure that good faith bargaining takes place and that any resultant comparison system and plan is gender-bias free. ONA alleges that the Respondent has breached sections 4(1) & (2), 5, 6(1), 7(1) & (2), 12 and 14.

6. North York has filed an Application (Tribunal File No. 0036-89) alleging that ONA has proposed a comparison system which does not meet the requirements of the *Act* and has intentionally negotiated in bad faith. North York alleges that ONA has breached section 14(2) of the *Act*.

7. Application Numbers 0029-89 and 0036-89 were also consolidated.

8. Following submissions made by the parties at the hearing held on December 18, 1989, the Tribunal decided that the Sunnybrook and North York Applications would be heard together with the two Applications in the Women's College case, which had been previously consolidated. The decision to hear the Women's College, Sunnybrook and North York Applications together was made to expedite the hearing process and to avoid a multiplicity of proceedings. It should be noted that these Applications were not consolidated. They are separate Applications which will simply be heard at the same time.

9. The distinction between consolidation and hearing matters together was dealt with by the Ontario Labour Relations Board in *Dresser Canada Inc.; Re C.A.W.; Re Group of Employees; Re U.S.W.A*, [1987] O.L.R.B Rep. Oct. 1243. The analysis of that distinction bears repeating here. At page 1245, the Board held:

> Strictly speaking, the effect of a consolidation is to fuse two or more proceedings into one. Accordingly, consolidation will only be appropriate in circumstances where there is an identity of parties and issues in two or more proceedings. The term has come to be used somewhat more loosely so that "consolidation" may be appropriate where the parties and issues are substantially the same. Technically, it is more appropriate, in such circumstances, that the matters be "heard together" rather than "consolidated". When matters are heard together, they retain their individual identities but the evidence and representations of the parties with respect to all matters in issue in the proceedings are heard at one time by one trier of fact and law. Hearing matters together can be a useful alternative to consolidating them into one, where the circumstances are such that consolidation is inappropriate but the practical exigencies make it desirable to have the matters proceed together.

*PMSK's Position*

10. Counsel for PMSK, Ms. LeGault, submitted that her client seeks to intervene on the basis that the issue in these proceedings is the validity of the job evaluation system distributed by PMSK. She argued that it is a fiction to state that the issue in each case is a particular employer proposal at each workplace. If this were true, she submitted, the matters could not be consolidated in the manner they have been.

11. Ms. LeGault further submitted that ONA's complaints against Sunnybrook and North York are very similar and do not themselves refer to the various employers' proposals in any individual sense. They refer to "concerns about SKEW methodology", "SKEW's job evaluation plan", "the SKEW system", the "Stevenson, Kellogg, Ernst & Whinney ("SKEW") Job Evaluation System" and "SKEW's job fact sheet". She argued that ONA's Application against Women's College Hospital (Tribunal File No. 0008-89) contains the same critique. The criticisms are directly and solely related to the methodology and contents of the job evaluation system marketed by PMSK.

12. Ms. LeGault submitted that PMSK seeks to intervene on the basis that it can be of great assistance to the Tribunal on a key issue in dispute: that is, the gender neutrality of the job evaluation system in question in the Sunnybrook, North York and Women's College Hospital cases. She argued that given the scope and length of the consolidated hearing, and the fact that the Tribunal can set conditions or limits on PMSK's participation, there will not be any significant delay or prejudice caused by such intervention. In any event, Counsel argued, the advantages of the intervention in terms of assistance to the Tribunal and ensuring greater acceptability of any decision on the job evaluation system, would greatly outweigh the inconvenience of any possible delay. Furthermore, Ms. LeGault submitted, PMSK will be directly and fundamentally affected by a ruling of the Tribunal in this consolidated hearing and therefore, according to the rules of fairness and natural justice, should be granted some degree of party status in these proceedings.

*Position of Sunnybrook and North York*

13. Counsel for Sunnybrook and North York, Ms. Baker, submitted that it is clear that a significant part of ONA's case in these proceedings is a general attack on the PMSK system, regardless of the size or nature of the Hospital. She submitted that the question to be answered in a third party application is not "who has the obligation to implement pay equity", but rather "are the issues such that PMSK has a separate interest in

the outcome". It is counsel's submission that given the general nature of ONA's attack on the PMSK system, the consultant organization does have a separate interest in these proceedings.

*ONA's Position*

14. Counsel for ONA, Ms. Cornish, submitted that the focus of these proceedings is the gender neutrality of the proposals put forward by the various hospitals regarding the comparison system to be used to evaluate the jobs in those particular workplaces. Counsel submitted that the issue is not the gender neutrality of the PMSK plan. Ms. Cornish argued that PMSK does not have the appropriate interest to intervene in these proceedings.

**DECISION OF THE TRIBUNAL**

15. We propose to consider PMSK's application in light of the following considerations:

1. Is PMSK a party under section 32(1) of the *Act*?
2. Is PMSK a party under section 5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484?
3. What considerations are relevant to interventions?
4. Should PMSK be granted party status in light of these considerations?

Section 32(1) of the *Act* provides:

> (1) Where a hearing is held before the Hearings Tribunal or where a review officer investigates for the purposes of effecting a settlement of an objection or complaint, the parties to the proceeding are;
> a) the employer;
> b) the objector or complainant;
> c) the bargaining agent (if the pay equity plan relates to a bargaining unit) or the employees to whom the plan relates (if the plan does not relate to a bargaining unit).

16. PMSK is a consulting firm retained by Sunnybrook and by North York to assist them in the preparation of their pay equity plans, does not fall within section 32(1), and therefore is not a party to these proceedings pursuant to the *Act*.

17. We now proceed to consider the provisions of section 5 of the *Statutory Powers Procedure Act*. Section 5 provides:

> 5. The parties to any proceedings shall be the persons specified as parties under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

18. As the Tribunal noted in *Women's College Hospital (No. 1)* (1989), 1 P.E.R. 53 the meaning of this provision is unclear. If the correct interpretation of section 5 is that where a statute names parties to proceedings which arise under it, then those are the only parties. Consequently PMSK cannot succeed in its application because it does not fall within section 32(1) of the *Act*.

19. The correct interpretation of section 5 may be that even where a statute specifies the parties to proceedings, if there are other persons who are entitled by law to be parties then they ought to be allowed to participate. If this is the case, then we propose to use the following criteria to determine if PMSK is entitled by law to participate in these proceedings:

(1) What are the issues in these particular cases?

(2) What is the nature and scope of the proposed intervenor's concern in these proceedings?

(3) What prejudice will there be to the parties if the intervenor is permitted to participate in the proceedings as a party?

a) Will the intervention widen the issues in dispute?

b) Will the intervention delay an expeditious determination of the dispute?

c) Will the intervention unreasonably add to the cost of the proceedings for the parties?

*What are the issues in these particular cases?*

20. What is clear from the submissions is that there is disagreement as to the definition of the dispute before the Tribunal. As outlined above, PMSK, Sunnybrook and North York maintain that the issue in these proceedings is the gender neutrality of the Aiken Plan distributed by PMSK. ONA maintains that the focus of these proceedings is on the gender neutrality of the proposals put forward by the Hospitals for comparison systems to be used in the preparation of pay equity plans for those particular workplaces.

21. We respectfully disagree with Ms. LeGault's contention that it is a fiction to state that the issue in each case is a particular employer proposal at each workplace. Section 14(2) of the Act provides:

> (2) The employer and the bargaining agent for a bargaining unit shall negotiate in good faith and endeavour to agree, before the mandatory posting date, on,
>
> a) the gender-neutral comparison system used for the purpose of section12; and
>
> b) a pay equity plan for the bargaining unit.

22. The focus of this provision is on a gender-neutral comparison system to be bargained by the parties to the negotiations. The term "job evaluation plan" is not mentioned in this or any other provision of the *Act*. The mandate of the Tribunal in each of the cases before us, therefore, is to examine the proposals for comparison systems put forward by Sunnybrook and North York. The issue is not the gender neutrality of the Aiken Plan. Certainly, we expect to hear evidence on the Aiken Plan since that appears to be the basis for the proposals put forward by Sunnybrook and North York. However, evidence of the gender neutrality of a particular job evaluation plan is only relevant to the extent that it relates to the gender-neutral comparison system that the parties must negotiate pursuant to section 14(2) of the *Act*. As the panel in *Haldimand-Norfolk (No. 5)* (1989), 1 P.E.R. 77 held:

> 2. .....
>
> 3. The only relevant issues before the panel are the issue of good faith bargaining and the issue of the gender neutrality of proposals put forward by the Respondent in this case. Evidence relating to the neutrality of the Mercer plan or any other plan is relevant only insofar as it relates to the gender neutral comparison system and the pay equity plan that these parties are required to negotiate under the *Pay Equity Act, 1987*.

23. Our view that particular job evaluation plans are not the focus of section 14(2) is reinforced by reason of the absence in that provision, or indeed in any provision of the *Act*, of any reference to consultants who market those plans. As this panel stated in the *Women's College Hospital (No. 1)* at paragraph 80:

> The developers, suppliers, or marketers of job evaluation plans are neither mentioned nor in any way given any status under section 14 regarding the negotiations that must take place..... The developer or supplier of a job evaluation plan is incidental to the process outlined in section 14(2).

24. Nor do we believe that it is our mandate to adjudicate upon the particular job evaluation plan marketed by PMSK. Our decision in these proceedings will focus on the particular workplaces, and any remedy given to any party will be restricted to the particular circumstances found at Sunnybrook and North York. In dealing with an application by William M. Mercer Ltd. for intervenor status in *Haldimand–Norfolk (No. 5)* the Tribunal noted that:

> The use of consultants or their private plans is incidental to the obligations employers and bargaining agents have under the *Act*. There are no statutory obligations placed upon companies which develop and market job evaluation methodologies; therefore it is difficult to conclude that the Tribunal would have any jurisdiction to hear and adjudicate on a methodology outside a specific workplace context. The issue in the case now before us with respect to any aspect of the Mercer methodology is a very narrow one, and such evidence must be heard in the context of the negotiations that have taken place between these parties.

*What is the nature and scope of the proposed intervenor's concern in these proceedings?*

25. In its Responses to Request for Hearings filed by PMSK in the Sunnybrook and North York cases, PMSK requests a declaration that the Aiken Plan itself is gender–neutral. In this regard PMSK's interest is clearly incidental or collateral to the main issue before us. As we have indicated, the issue in these proceedings is the gender neutrality of the proposals put forward by Sunnybrook and North York regarding a comparison system in those particular workplaces. PMSK does not have an interest in this issue.

26. In its Responses, PMSK has also indicated that any decision of the Tribunal has the potential for a material, direct and significant financial effect on it. In both the *Haldimand–Norfolk (No. 5)* and the *Women's College Hospital (No. 1)* decisions, the Tribunal rejected a commercial interest as a basis for intervention. We see no reason to depart from that position in these proceedings and consequently PMSK is not granted intervenor status on this ground.

*What prejudice will there be to the parties if the intervenor is permitted to participate in the proceedings?*

27. If PMSK is permitted to participate in these proceedings, its participation would be limited to the issue of the gender neutrality of the Hospitals' proposals. Since the Tribunal has the authority to control the proceedings before it, it can ensure that the parties will not venture beyond what is in issue. Therefore, this factor, while important, is not determinative in this case.

28. Ms. LeGault has argued that given the scope and length of the consolidated hearing, there would not be any significant delay or prejudice caused by permitting the intervention by PMSK. In fact, the Women's College, Sunnybrook and North York cases have not been consolidated; they will, however, be heard together. That will obviously lengthen the proceedings considerably since now the Tribunal will be deciding issues in three proceedings rather than in one. Adding another party to the Sunnybrook and North York cases will inevitably lengthen the proceedings even more. As this Panel indicated in the *Women's College Hospital (No. 1)* decision, while delay, in and of itself, is not determinative of the issue before us it is a factor to take into account.

29. The issue of whether the addition of PMSK in these proceedings would add to the cost was not argued and therefore it is not a factor which we take into account.

30. In considering the various criteria we have concluded as follows. The issue before the Tribunal is the gender neutrality of comparison system proposals put forward by Sunnybrook and North York. PMSK has a commercial and incidental interest in the outcome of the proceedings, which is not sufficient to allow it to participate. Furthermore, the addition of PMSK would lengthen the proceedings. In weighing all of the criteria we are of the view that PMSK ought not to be afforded party intervenor status in these proceedings.

31. Accordingly, we do not grant intervenor party status to Peat Marwick, Stevenson & Kellogg.

**DECISION OF MEMBER, SHARON LAING, APRIL 12, 1990**

1. I dissent from the majority's decision denying Peat Marwick Stevenson & Kellogg (PMSK) intervenor status in these proceedings.

2. Before turning to the primary focus of my disagreement, I wish to record my concurrence with the analysis of s.32(1) of the *Pay Equity Act, 1987*, S.O. 1987, c.34 and s.5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484. Without determining which interpretation of s.5 is correct, the majority proceeds to determine whether PMSK is entitled by law to participate in these proceedings. I note the decision of the Chair of the Tribunal in Wentworth County Board of Education, (1990) 1 P.E.R. 132 at paragraph 29, in which she finds

> 29. The Tribunal has the authority to permit interventions in a proceeding pursuant to Section 29(2)(b) of the *Act* and may exercise that authority pursuant to Rule 16.01. Whether the Tribunal permits non-party intervenors in the proceedings is an exercise of the Tribunal's discretion.

3. I now turn to a consideration of the criteria enunciated at paragraph 15 of the majority decision in determining non-party intervention.

*What are the issues in these particular cases?*

4. The issues in this hearing are broader than a dispute between one employer and one bargaining agent. Indeed, the issue is broader than the proposals of the three employers and the bargaining agents. What started as six Requests for Hearing, (subsequently consolidated into three cases being heard together), now involves two additional employers in the original Women's College hearing. In each of the three hospital settings, the employer has proposed use of the Aiken Plan marketed by PMSK as the basis of their gender-neutral comparison system. ONA has attacked that job evaluation system as "fundamentally flawed". The evidence and argument respecting the gender neutrality of both the comparison system in general and its application to Sunnybrook Medical Centre, North York General Hospital and Women's College Hospital will be presented together. In this sense, the case goes beyond the nature of *lis inter partes*, and relates to a job evaluation system which will form the basis of many pay equity plans across the province.

5. In the early stages of pay equity litigation, the Tribunal must be sensitive to understanding the perspectives of parties who must achieve pay equity. Job evaluation has long existed and is the basis upon which large numbers of employees have been compensated. It is expected that significant numbers of employers, employees and bargaining agents alike will continue to rely on these well established job evaluation systems as a practical way of achieving pay equity in their workplaces. Accordingly, it is clear that

this case will deal not only with the proposals of these employers before us, but by necessary inference, the imported job evaluation system being relied upon. This is the practical reality, irrespective of the fact that the term "job evaluation system" is not found in the legislation.

6. I accept that s.14(2) of the *Pay Equity Act, 1987* specifies those who have obligations to negotiate pay equity; key to that negotiation is the gender-neutral comparison system to be used. However, I do not accept that, by allowing the proposed intervention, somehow that onus and responsibility shifts. It clearly remains with employers and bargaining agents. There is no dispute on this matter by the employers.

*What is the nature and scope of the proposed intervenor's concern in these proceedings?*

7. In my view, PMSK's commercial interest in and of itself is not a sufficient basis on which to grant intervenor status. However, the Tribunal must be eager to ensure it is fully informed of the facts and issues in dispute, in order to render effective decisions. It may be preferable to obtain this evidence directly from PMSK, and accordingly, I would permit PMSK to intervene for this limited purpose.

*What prejudice will there be to the parties if the intervenor is permitted to participate in the proceedings?*

8. As indicated above, we have before this panel six original requests for hearing consolidated into three cases being heard together. It is clear that the hearing will involve extensive evidence regarding the Aiken Plan. Accordingly, I am not persuaded that the proposed intervention would add unreasonably to the length or cost of the hearing, but rather, may produce a more efficient and effective process.

9. For the foregoing reasons in these circumstances, I would grant PMSK non-party intervenor status.

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**0037-89** Nepean Public Library Board Applicant v. Canadian Union of Public Employees and its Local 2504 and The Corporation of the City of Nepean Respondents

**Before:** Patricia Hughes, Alternate Chair, and Members Sharon Laing and Susan Genge

**Cite As: Nepean Public Library Board (No. 2)** (1990), 2 P.E.R. 18

**Practice and Procedure - Adjournments**

**The parties agreed to adjourn the application *sine die* and that none of them would bring it back on for hearing until after the release of the Ontario Court of Appeal decision in *Re Haldimand-Norfolk and Ontario Nurses' Association* (1989), 1 P.E.R. 188 (Div. Ct.); leave to appeal granted April 17, 1990 (Ont. C.A.). In *Nepean Public Library Board (No.1)* (1990), 2 P.E.R 7, the Tribunal adjourned the hearing of this application *sine die*, but advised the parties that it proposed to terminate the matter at the expiry of one year from that date unless one of them brought the matter back on for hearing within that time. The parties were invited to make submissions on this proposal. The City and the Library objected to the proposed limit on the *sine die* adjournment. The issue before the Tribunal was whether to impose the proposed limitation.**

**The Tribunal imposed the proposed limitation.**

**The parties' agreement is not entirely "private" in that it contemplates the use of the Tribunals' resources and requires the Tribunal's consent. It is not unusual for adjudicative bodies to establish procedures to manage their caseload since such procedures assist them in distributing their resources to the benefit of all parties which appear before them. Section 29(1)(b) of the *Act* permits the Tribunal to establish such procedural rules. The Tribunal's proposal reflects the model adopted by the Ontario Labour Relations Board. In this case, the parties have agreed to a condition which might run afoul of the one year expiry. In such circumstances, it might appear that the Tribunal ought not to impose the condition at all. However, the condition does not impose a bar to the parties' proceeding with their case: they are free to amend their agreement or they may request the Tribunal to extend the adjournment beyond one year. By the one year limitation the Tribunal is able to respond to the need to manage its caseload without prejudicing the parties.**

**Pratique et procédure - Ajournements**

**Les parties ont convenu d'ajourner indéfiniment la requête et de ne pas demander d'audience tant que la Cour d'appel de l'Ontario n'aurait pas rendu sa décision dans l'affaire *Haldimand-Norfolk et l'Association des infirmières et infirmiers de l'Ontario* (1989), 1 P.E.R. 188 (Cour div.). L'autorisation d'interjeter appel a été accordée le 17 avril 1990 (Cour d'appel de**

l'Ontario). Dans *Conseil de bibliothèques publiques de Nepean (no 1)* (1990), 2 P.E.R. 7, le Tribunal a ajourné indéfiniment l'audition de la requête mais informé les parties qu'il se proposait de mettre fin à l'affaire un an plus tard, jour pour jour, sauf si l'une d'entre elles le saisissait à nouveau de l'affaire au cours de ce délai. Il a invité les parties à lui présenter des observations sur cette proposition. La ville et la bibliothèque se sont opposées au délai de péremption proposé. La question dont était saisi le Tribunal était la suivante : doit-il imposer ou non ce délai de péremption?

Le Tribunal a imposé le délai de péremption proposé.

L'entente des parties n'est pas entièrement «privée» car elle envisage l'utilisation des ressources du Tribunal et requiert son consentement. Il est courant pour les organes judiciaires d'élaborer des règles de procédure afin de gérer leur charge de travail. Ces règles leur permettent de répartir leurs ressources entre toutes les parties qui comparaissent devant eux. L'alinéa 29(1)b) de la *Loi* autorise le Tribunal à adopter de telles règles de procédure. La proposition du Tribunal est semblable à la formule adoptée par la Commission des relations de travail de l'Ontario. Dans le cas présent, les parties ont convenu d'une condition qui peut être en contradiction avec le délai de péremption d'une année. Dans ces circonstances, il semblerait que le Tribunal ne devrait pas imposer la condition. Toutefois, cette condition n'empêche pas les parties de donner suite à l'affaire : elles sont libres de modifier leur entente ou de demander au Tribunal de proroger l'ajournement au-delà du délai d'un an. Ce délai de péremption d'un an permet au Tribunal de gérer sa charge de travail sans préjudice pour les parties.

## DECISION OF THE TRIBUNAL, APRIL 20, 1990

1. By decision dated February 20, 1990, the Tribunal adjourned this matter *sine die* on agreement of the parties. In addition, the Tribunal advised the parties that it proposed to add the following sentence to the adjournment:

> Should neither [sic] of the parties request that the matter be brought on for hearing before the expiry of a year from the date hereof, it will be terminated by the Tribunal.

The Tribunal advised the parties that they had 21 days to make submissions on the proposed disposition. The Nepean Public Library Board ("the Library") and the Corporation of the City of Nepean ("the City") took advantage of the opportunity to make timely and thorough submissions. The Canadian Union of Public Employees and its Local 2504 did not file any submissions in response to the Tribunal's invitation.

2. The parties had agreed that none of them would bring the matter back on for hearing until "after the date of release of the Ontario Court of Appeal's decision in the Pay Equity case before it in the matter between the Ontario Nurses' Association and The Regional Municipality of Haldimand-Norfolk and others". (See *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R 17; application for judicial review dismissed, *Haldimand-Norfolk and Ontario Nurses' Association* (1989), 1 P.E.R. 188 (Div. Ct.); leave to appeal granted, April 17, 1990 (C.A.).) They placed no time restriction on themselves in regard to the period following the release of the Court of Appeal's decision. It is not clear whether the agreement's reference is only to the application for leave to appeal or, should leave be granted (as it since has been), to the disposition on the merits. For the purposes of explaining this decision, we have assumed the latter since it encompasses all possible outcomes.

3. The City and the Library candidly conceded that they could not fault the actual proposal of the Tribunal. Counsel for the City, for example, stated that:

> In view of the fact that the leave to appeal application with respect to Haldimand-Norfolk is to be heard on or about the 17th of April, I suppose that one can have no serious disagreement with the Decision of the Tribunal, fixing a limitation period of (I think) February 20, 1991.

4. Counsel for the Library referred to the fact that "[t]he Tribunal's rules clearly leave to the Tribunal the discretion to accept or reject a request for an adjournment which gives it the right to impose terms if such a request is granted. One cannot therefore take exception to the imposition of terms by this particular Order". Counsel also observed that "[a]part from the rather serious concerns about the meaning of the word 'terminated' [we deal with this point below] the effect of the Order may not be legally prejudicial to the parties".

5. Nevertheless, both counsel objected rather strenuously to the decision and its proposed limit on the *sine die* adjournment. The City's concern was that it did not have an opportunity to make submissions before being advised of the Tribunal's intention to impose the limit on the duration of the adjournment and apparently will not have the right to make submissions before the matter is actually terminated. Counsel also questioned "why the 'normal' Rules of Procedure have to be re-invented by every Tribunal", referring to Rules 48.14 and 61.12(2) and (3) of the Rules of Civil Procedure. The Library resented what it sees as interference in the parties' private agreement; in addition, the Library is not sure whether a decision terminating *this* matter after the expiry of a year means that only this particular application is terminated or whether (in counsel's words) "the parties would lose their right to have any adjudication whatsoever".

6. In this case, for their own reasons, the parties reached an agreement about how they would proceed at least until the Court of Appeal has issued its decision in *Haldimand-Norfolk, supra*. The agreement is, almost entirely, a private agreement among the parties; its contents, with one exception, neither seek nor warrant the Tribunal's involvement. The one exception is that the parties wish to retain the *possibility* of the Tribunal's involvement and in that sense, the agreement is no longer "private", because it contemplates use of the Tribunal's resources and requires the Tribunal's agreement; it is in that respect, and that respect only, that the Tribunal has proposed to affect the agreement by imposing a year's limitation on the adjournment *sine die*.

7. It is not unusual for adjudicative bodies to establish procedures to manage their caseload, as was recognized by counsel for the City. Such "case management" assists the courts and administrative tribunals in distributing their resources to the benefit of all parties which appear before them. For example, by virtue of Rule 48.14 of the Rules of Civil Procedure, once a statement of defence has been filed, the parties shall be required to show cause why an action should not be dismissed for delay when two years has passed and the action has not been placed on the trial list or terminated. With respect to appeals, there are analogous provisions, although these do not necessitate a hearing before dismissal as is the case under Rule 48.14. The Ontario Labour Relations Board has issued Practice Note No. 14 which advises the parties that where the Board adjourns a matter *sine die*,

> [it] will deem the application or complaint withdrawn at the expiry of one year from the date upon which the adjournment *sine die* was granted and the Board's record will be endorsed accordingly without further notice to the parties, provided that within that period of time a party has not requested that the Board schedule the matter for further hearing.

A Board decision adjourning a matter *sine die* will usually bring that consequence to the attention of the parties in the particular case.

8. The Tribunal's proposal reflects the model adopted by the Labour Relations Board. Authority for the proposal is found in Rule 11.02 of the Tribunal's Rules of Practice which provides that "Once a date has been set for a hearing, an adjournment will not be permitted except with leave of the Tribunal". In addition, paragraph 29(1)(b) of the *Pay Equity Act, 1987* permits the Tribunal to "make rules for the conduct and management of its affairs and for the practice and procedure to be observed in matters before it".

9. The decision contemplated by the Tribunal would constitute *one year's notice* of the termination. As for the consequences of the matter's being "terminated", the Tribunal's decision on its face deals only with the application before it. There is nothing to suggest a party would not be able to file another

application in relation to the same issues, should this particular application be terminated; should it do so, however, it would be required to go through the procedures contemplated by the legislation.

10. In the normal course, where the parties are aware that the matter may be terminated as of a certain date, a party may request the matter come back on for hearing at any time during that one year period and the hearing would proceed or the parties could request a further adjournment *sine die*. In the latter event, the Tribunal would have the discretion to grant the adjournment request, with or without terms, or deny it.

11. In this case, however, the parties have agreed to a condition which might run afoul of a one year expiry, since it is not beyond contemplation that the Court of Appeal's decision in the *Haldimand–Norfolk* case, *supra*, might not issue until after a year has passed. (The condition does not necessarily have that result, of course, since the Court of Appeal might not have granted leave or might issue a decision on the merits prior to the expiry of a year.) Should the Court of Appeal take longer than a year, a party could not request the matter come back on for hearing before the expiry of a year without breaching the agreement.

12. It might appear, therefore, that we should not impose the condition at all in this case, in light of the specific condition in the agreement (although neither the City nor the Library based its objection on this ground). This might be so if the Tribunal's condition imposed a bar to the parties' proceeding with their case. It does not, however. The parties are quite free to amend their own agreement to permit one or more of them to come back to the Tribunal in the event that the Court of Appeal's decision has not issued within the one year period. Alternatively, any party would be free to request the Tribunal to extend the period for the *sine die* adjournment beyond a year. By the one year limitation, the Tribunal is able to respond to the need to manage its caseload without prejudicing the parties. Furthermore, any problem arising from the specific condition in the parties' agreement will not arise until the expiry of the one year period approaches, and to consider the matter now would be premature.

13. Since the release our February 20th decision, the Tribunal has issued Volume 1 of the *Pay Equity Reports* which contains a Practice Note ("Practice Note No. 1") similar to the one issued by the Labour Relations Board to which we referred earlier. Practice Note No. 1 does not, of course, apply to this matter, since it appeared after the parties' request and our first decision. Rather, the parties herein had specific and particular notice of the Tribunal's intention to impose the condition. Nevertheless, we take this opportunity to comment on the use of Practice Notes. They are intended to advise people about the approach normally followed by the Tribunal in "standard" matters. Parties may argue that the general practice is not appropriate for their circumstances and if the Tribunal agrees, it will not follow its usual practice as set out in the Practice Note or will accommodate it to the special circumstances of the parties. Practice Note No. 1 advises the parties what the Tribunal will normally do when a *sine die* adjournment is requested and granted. Any general policy established by the Tribunal must be flexible and subject to the particular circumstances of the individual case.

14. We have considered the submissions of the parties. We have taken into account that the parties restricted their own action before they were aware that the Tribunal might impose a limit on the adjournment. We have made it clear that the Tribunal would, of course, deal with submissions from the parties should the restrictive clause in the parties' agreement prevent a party's bringing the matter back on for hearing within the period of a year, as the Tribunal's condition would allow and require to prevent the termination of the matter.

15. Having regard to the above, we are now giving one year's notice to the parties that should no party to this application attempt to bring the application before the Tribunal by the expiry of one year from the date of this decision, the matter will be terminated.

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**0042-89 0050-90 0051-90 0052-90 0053-90 0054-90 0057-90 0064-90 0066-90** Ontario Nurses' Association Applicant v. Cornwall General Hospital Respondent; Ontario Nurses' Association Applicant v. St. Joseph's General Hospital Respondent; Ontario Nurses' Association Applicant v. Almonte General Hospital Respondent; Ontario Nurses' Association Applicant v. Carleton Place & District Memorial Hospital Respondent; Ontario Nurses' Association Applicant v. Temiskaming Hospital Respondent; Belleville General Hospital Applicant v. Ontario Nurses' Association Respondent; York Finch General Hospital Applicant v. Ontario Nurses' Association Respondent; Ontario Nurses' Association Applicant v. Belleville General Hospital Respondent; Ontario Nurses' Association Applicant v. St. Joseph's General Hospital - Parry Sound Respondent

**Before:** Patricia Hughes, Alternate Chair, and Members Donald Dudar and Bruce Budd

**Cite As: Cornwall General Hospital** (1990), 2 P.E.R. 22

### Practice and Procedure - Adjournments

By agreement, the parties in several cases before the Tribunal requested that the Tribunal: (1) adjourn the applications until the Tribunal had determined the *Women's College Hospital* case; and then (2) list the applications before the panel hearing *Women's College Hospital*. The parties also advised the Tribunal of their agreement to reserve the right to complete any outstanding pleadings at the time of the relisting of the application.

The Tribunal granted the adjournments subject to the requirement that the applicant in each case inform the Tribunal within thirty days of the release of reasons for decision in *Women's College Hospital* of its intention to proceed with the case or not. It declined to direct that the applications be listed before the *Women's College Hospital* panel and held that the question of the completion of outstanding pleadings was more properly one for the panel assigned to hear the case.

The parties will need some time to decide the impact of the *Women's College Hospital* decision(s) on their own cases. There is a concern in light of the purpose and mandatory posting dates of the *Act* that the Tribunal be able to schedule cases as promptly as possible and manage its own resources as efficiently as possible. There should therefore be some limit on the parties' period of assessment. Thirty days is a period which protects both the parties' interests and the Tribunal's concerns. This condition does not prejudice any party, but it does ensure that the respondent and the tribunal are aware of the state of these matters within a reasonable period following the release of the reasons for decision in *Women's College Hospital*. On the other hand, it ensures that the applicant has thirty days in which to consider its options before the respondent can move to have the application dismissed.

### Tribunal Member Bruce Budd Dissented

The adjournment should be granted without any time limit. A deadline is an unnecessary, administrative restriction on the parties which will be counter productive. Were a time limit advisable, it should be long enough to permit the parties to retain counsel, to consult with their counsel and other members in their respective communities and to attempt to negotiate a settlement. Given that the *Women's College Hospital* decisions may be complex, 30 days is inadequate to allow for and encourage a negotiated settlement. From an administrative perspective, such a time limit will lead to relisting of cases which are ultimately adjourned after settlement is reached, resulting in the unnecessary scheduling of cases and panels.

### Pratique et procédure - Ajournements

Les parties à plusieurs instances devant le Tribunal se sont entendues pour lui demander ce qui suit : 1) ajourner leurs requêtes jusqu'à ce qu'il ait statué sur l'affaire du *Women's College Hospital*; 2) inscrire les requêtes au rôle d'audience du comité chargé d'entendre l'affaire du *Women's College Hospital*. Les parties ont également avisé le Tribunal qu'elles s'étaient entendues pour se réserver le droit d'exécuter tout acte de procédure inachevé au moment de la nouvelle inscription de leur requête au rôle.

Le Tribunal a accueilli les demandes d'ajournement à la condition suivante : le requérant, dans chaque cause, devra informer le Tribunal, dans les trente jours qui suivent la publication des raisons motivant la décision prise dans l'affaire du *Women's College Hospital*, de son intention de donner suite ou non à sa requête. Il a refusé d'ordonner que les requêtes soient inscrites au rôle d'audience du comité qui a entendu l'affaire du *Women's College Hospital* et a conclu que la question relative à l'exécution des actes de procédure devait plutôt être tranchée par le comité chargé d'entendre l'affaire.

Les parties auront besoin de quelques semaines pour évaluer les incidences de la ou des décisions rendues dans l'affaire du *Women's College Hospital* sur leurs propres causes. Compte tenu de l'objet de la *Loi* et des dates d'affichage obligatoires, on se préoccupe du fait que le Tribunal ne puisse prévoir l'audition des causes aussi rapidement que possible ni gérer ses propres ressources aussi efficacement que possible. Par conséquent, la période d'évaluation consentie aux parties devrait être limitée dans le temps. Un délai de trente jours permet de protéger les intérêts des parties et de répondre aux préoccupations du Tribunal. Cette condition ne lèse aucune partie, mais elle permet à l'intimé et au Tribunal de connaître l'état des causes dans un délai raisonnable après la publication des raisons motivant la décision rendue dans l'affaire du *Women's College Hospital*. Quant à lui, le requérant bénéficie d'un délai de trente jours pour étudier les choix qui s'offrent à lui avant que l'intimé puisse présenter une motion pour que la requête soit rejetée.

**Dissentiment de Bruce Budd, membre du Tribunal**

**L'ajournement ne devrait pas être assorti d'un délai. Une date limite est une restriction administrative inutile qui gênera les parties dans leurs démarches. Si un délai est vraiment nécessaire, il faudrait qu'il soit suffisamment long pour permettre aux parties de retenir les services d'un avocat, de le consulter, de consulter les autres membres de leur milieu et d'essayer de négocier un règlement. Étant donné que les décisions rendues dans l'affaire du *Women's College Hospital* risquent d'être complexes, un délai de 30 jours est insuffisant pour prévoir et encourager la négociation d'un règlement. D'un point de vue administratif, un tel délai se traduira par l'inscription au rôle d'audience de causes qui seront finalement ajournées après la négociation d'un règlement avec, pour conséquence, la prévision inutile de causes et la constitution de comités superflus.**

**DECISION OF THE TRIBUNAL, MAY 2, 1990**

1. By letter dated April 23, 1990, in regard to each of the applications listed above, the parties on agreement requested adjournment "pending the determination of the *Women College Hospital et al* case" (see *Women's College Hospital*, Tribunal File Numbers 0008–89 and 0011–89) and further requested that the application be listed before the panel of the Tribunal seized with the *Women's College* cases, *supra*.; the parties also advised the Tribunal of their agreement to "reserve the right to complete any outstanding pleadings or documentation required by the Rules of Practice at the time of the relisting of the relevant applications for hearing before the Tribunal".

2. We note that File Number 0042–89 was previously adjourned *sine die* on agreement (by letter from the applicant therein dated January 30, 1990 and the Registrar's letter dated February 1, 1990). Therefore, we deal no further with that file. Our reference to "applications" below encompasses all the remaining applications which are the subject of the parties' requests.

3. In a decision dated December 19, 1989, the panel hearing the *Women's College* cases, *supra*, ruled that certain applications would be heard together with *Women's College*, *supra*, and adjourned *sine die* certain other applications with which they would remain seized. They also made the following determination:

> 3. Subsequent Applications filed with the Tribunal concerning matters similar to those raised in the Applications listed in paragraph 2 of this Ruling, will be dealt with by the Tribunal on an individual basis.

The applications before us are "subsequent applications . . . concerning matters similar to those raised in the [applications before the *Women's College* panel]".

4. The parties evidently anticipate that the decision(s) in the *Women's College* cases, *supra*, may assist them in resolving their own disputes. Accordingly, they wish to suspend their proceedings until the relevant issues in the *Women's College* cases, *supra*, have been decided. No doubt, the parties will need some time to decide the impact of the decisions in those cases on their own cases and to decide how they or any one of them wishes to proceed. At the same time, we are concerned in light of the purpose and mandatory posting dates of the *Act* that the Tribunal be able to schedule cases as promptly as possible and manage its own resources as efficiently as possible and therefore believe there should be some limit on that period of assessment.

5. We believe that thirty days is a period which protects both the parties' interests and the Tribunal's concerns. To be clear, all the applicant is required to do within the thirty days is to inform the Registrar (ultimately in writing) whether it wishes to proceed with the application, withdraw it or adjourn it. The Tribunal's normal procedures will then follow. No party will be required to complete any pleadings or documentation within this time period; any outstanding pleadings, or issues of amendment, should they arise, can be dealt with subsequently after dates are scheduled for hearing.

6. By way of comparison, we note that under the Tribunal's Rules of Practice, respondents are expected to respond comprehensively to what are often detailed applications, within twenty-one days of being served by the application; and that parties wishing to appeal decisions to an Ontario appellate court are subject to time periods ranging from seven to thirty days, depending on the nature of the decision being appealed from and whether leave to appeal is required. Our requirement imposes nothing so onerous.

7. This condition does not prejudice any party but it does ensure that the respondent and the Tribunal are aware of the state of these matters within a reasonable period following the release of the reasons for the decision in *Women's College, supra*. On the other hand, it ensures that the applicant has thirty days in which to consider its options before the respondent can effectively move to have the application dismissed. Furthermore, should the decisions in the *Women's College* cases, *supra*, prompt the parties to try to settle their case themselves, they are free to seek an adjournment, as are any parties before the Tribunal who are engaged in settlement discussions. They are subject to the same freedoms and limitations as any parties who have invoked the resources of the Tribunal to help them resolve their dispute.

8. The Tribunal therefore grants the parties' request to adjourn these applications "pending the determination" in the *Women's College* cases, *supra*. We direct that the applicant in each of these applications advise the Registrar of the Tribunal within thirty calendar days of the release of the reasons for the decision in the *Women's College* cases, *supra*, of its intention to proceed with the application or not.

9. Should any of these applications be relisted for hearing, it will be scheduled in the normal course. We decline to direct that any of these applications be scheduled before the panel hearing the *Women's College* cases, *supra*.

10. The question of completion of outstanding pleadings or documentation in any of these applications is more properly a question for the panel assigned to hear the case. We note that there is agreement by the parties to any such completion.

11. Accordingly, these applications are adjourned in accordance with the above provisions.

**DECISION OF MEMBER, BRUCE BUDD, MAY 1, 1990**

1. While I concur with the majority on the question of granting the parties' request to adjourn and on the question of completion of any outstanding pleadings, I dissent from their decision to impose a deadline to respond within thirty days of the release of the final *Women's College et al* decisions.

2. The legislation is designed to encourage a self managed process by the parties. In its experience to date, the Tribunal has not encountered unnecessary delay by the parties who are aware of their obligations under the Act. I note that the panel in Women's College did not see the need to set a time limit and that in the cases before this panel the parties did not ask for, nor were they consulted on, such a limit. Thus, a deadline is an unnecessary, administrative restriction on the parties which will be counter productive.

3. Furthermore, were a time limit advisable, it should be long enough to permit the parties to retain counsel, to adequately consult internally, with their counsel and with other members in their respective communities, but most importantly, to attempt to negotiate a settlement based on their particular circumstances. In these cases, given that there will be three *Women's College et al* decisions that may be complex in several areas, possibly with different fact situations, thirty days is clearly inadequate to allow for and encourage a negotiated settlement between the parties.

4. Lastly, from an administrative perspective, such a time limit will lead to the premature relisting of cases which are ultimately adjourned after the parties reach a voluntary settlement. This can only result in the unnecessary scheduling of cases and panels with unintended inefficiencies.

5. For the above reasons, I would not impose an arbitrary deadline on the parties.

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**0078-90 0079-90 0080-90 0081-90 0082-90** Ontario Nurses' Association Applicant v. Penetanguishene General Hospital Respondent; Ontario Nurses' Association Applicant v. Clinton Public Hospital Respondent; Ontario Nurses' Association Applicant v. Saugeen Memorial Hospital Respondent; Ontario Nurses' Association Applicant v. Bruce Peninsula Health Services Respondent; Ontario Nurses' Association Applicant v. Groves Memorial Community Hospital Respondent

**Before:** Patricia Hughes, Alternate Chair, and Members Susan Genge and Janet Slone Taylor

**Cite As:** **Penetanguishene General Hospital** (1990), 2 P.E.R. 25

**Practice and Procedure - Adjournments**

The parties in several applications before the Tribunal requested that the Tribunal adjourn the applications until the Tribunal had determined the *Women's College Hospital* cases.

The Tribunal required further submissions from the parties explaining why it might be of assistance to adjourn these matters pending the determination of *Women's College Hospital*.

The question before the panel in the *Women's College Hospital* cases is whether the comparison system proposed by the employers, referred to as the "SKEW" system, is gender neutral. These applications involve "SKEW". It is assumed that the assistance these parties expect to receive from the *Women's College Hospital* cases will relate to the comments by the panel in those cases on "SKEW". All these applications, however, also rest on objections to the orders of review officers and request that a comparison system not at issue in *Women's College Hospital* be declared gender biased. In addition, they allege that the review officer orders violate the *Act*. Two of the applications raise disclosure issues, which are also not an aspect of the *Women's College Hospital* case. Since there are significant issues in dispute in these five applications that apparently could not be resolved by the disposition of the *Women's College Hospital* cases, it is not clear why the parties do not wish to proceed.

**Pratique et procédure - Ajournements**

Les parties à plusieurs requêtes présentées au Tribunal lui ont demandé d'ajourner les requêtes jusqu'à ce qu'il ait statué sur les causes du *Women's College Hospital*.

Le Tribunal a demandé aux parties de lui communiquer des observations supplémentaires sur les raisons pour lesquelles il serait utile d'ajourner ces affaires en attendant la décision relative au *Women's College Hospital*.

Le comité chargé d'entendre les causes du *Women's College Hospital* doit décider si le système de comparaison que propose les employeurs, à savoir le système «SKEW», est non sexiste. Les requêtes dans la présente affaire concernent ce système. On présume que les parties veulent connaître les observations du comité sur les affaires reliées au système «SKEW». Toutefois, toutes ces requêtes sont également fondées sur des objections aux ordres des agents de révision. De plus, les parties demandent qu'un système de comparaison qui ne constitue pas la question en litige dans les causes du *Women's College Hospital* soit déclaré sexiste. Finalement, elles prétendent que les ordres de l'agent de révision enfreignent la *Loi*. Deux des requêtes portent sur des questions liées à la divulgation de renseignements, qui ne constituent pas un aspect des causes du *Women's College Hospital*. Étant donné que ces cinq requêtes soulèvent des points litigieux importants que la résolution des causes du *Women's College Hospital* ne pourrait apparemment trancher, le Tribunal ne sait pas pourquoi les parties ne veulent pas donner suite à leur requête.

**DECISION OF THE TRIBUNAL, MAY 23, 1990**

1. By letter dated May 3, 1990, the applicant in the above files advised the Tribunal of the request by the applicant and respondent in each of the files "to adjourn the above-noted applications pending the determination of the *Women's College Hospital et al* case" (see *Women's College Hospital*, Tribunal File Numbers 0008-89 and 0011-89). Attached to that letter was a copy of the letter from the Ontario Hospital Association which represents each of the respondents in the above files. It states that "[w]e are in agreement with adjourning *sine die* the applications involving these five Hospitals pending the determination of the *Women's College Hospital et al* case . . . ." While eventually there may be no difference between adjourning *sine die* and adjourning to a point solely determined by the release of a decision in a specific case, the Tribunal has, as a general matter, limited *sine die* adjournments to a period of one year, as set out

in its Practice Note No. 1. No such limit applies in an adjournment of the second kind, although that does not mean other consequences might not apply to such an adjournment. The parties need to clarify which sort of adjournment they are seeking before it can be considered by the Tribunal.

2. We have a second and more substantive concern arising out of this request, however, which relates to the connection between those applications and *Women's College Hospital* cases, *supra*, which are currently being heard by the Tribunal.

3. Based on the amended pleadings in the *Women's College Hospital* cases, *supra* (and in two other cases being heard by the same panel together with the *Women's College Hospital* cases), the question before the panel in those cases is in essence whether the comparison system proposed by the employers in those cases is gender-neutral within the meaning of the *Pay Equity Act, 1987* ("the *Act*"). In each case, that is referred to as the "SKEW" system ("SKEW" as used below refers to the systems proposed by the employers in the *Women's College Hospital* cases, *supra*). One assumes, therefore, that whatever assistance the parties in the above files expect to receive from the decision(s) in the *Women's College Hospital* cases, *supra*. will be related to the comments by the panel in those cases on "SKEW" in the circumstances of those cases.

4. In each of these five applications, the applicant alleges that the respondent employer has failed to bargain in good faith because it has proposed a comparison system, SKEW, which the applicant alleges is gender-biased. The immediate reason each of these five cases is before the Tribunal, however, is because the applicant objects to the order by the Review Officer therein. In each case, the Review Officer directed the parties to make comparisons using a particular comparison system; the system the parties are directed to use is not SKEW.

5. In File Numbers 0078-90 and 0082-90, the Review Officer specified job classes and ordered the parties to make comparisons using the "Paired Comparison Ranking System" attached to the order [in the former case, the Officer directed the parties to compare a specified female-dominated job class with a specified male-dominated job class; in the latter case, the Officer specified the job classes in the bargaining unit]. The objection to the order in each case claims that the system referred to in the order will "result in a gender-biased comparison" and also that the Review Officer failed to take into account the requisite "items" in determining job class.

6. In File Number 0079-90, the Review Officer ordered that comparison be made between two specified classes, one of which he had ordered be treated as a male-dominated job class, using the "Paired Comparison Ranking System". The objection to the order is that the ranking system will result in a gender-biased comparison.

7. In File Numbers 0080-90 and 0081-90, the Review Officer ordered the parties to use a specified questionnaire to collect job data and to use "the paired comparison ranking system contained in the Pay Equity Commission book entitled 'Pay Equity in Small Workplaces'. . . ."; he also ordered the employer to disclose certain information. The objections to the order in both files are that the ranking system will result in a gender-biased comparison and that the questionnaire was designed for use with "a gender neutral comparison system other than that ordered" and therefore "will result in an inconsistent evaluation of factors".

8. In brief, among other requests for relief, the applicant requests in each of these files a declaration by the Tribunal that SKEW is gender-biased and a direction that the parties use another system as set out by

the applicant and declarations "that the comparison system(s) proposed by the Review Officer (are) gender biased and unlawful in the circumstances of this case and cannot be the subject of negotiations or agreement" and that "the Order of the Review Officer with respect to job classes is premature and violates the *Pay Equity Act*". In File Numbers 0079-90 and 0080-90, the applicant also requests an order that the employer disclose compensation or salary information "for all of the job titles in the Establishment".

9. Thus it is correct to say that the applications involve the same comparison system, namely SKEW, as in the *Women's College* cases, *supra*. All the applications, however, also rest on objections to the orders of the Review Officers and request that a comparison system not at issue in the *Women's College* cases, *supra*, be declared gender-biased. In addition, they allege that the Review Officers' orders *in themselves* violate the *Act*. Finally, two of the applications raise disclosure issues, also not an aspect of the *Women's College Hospital* cases, *supra*.

10. Since there are significant issues in dispute in these five applications that apparently could not be resolved by the disposition of the *Women's College Hospital* cases, *supra*, it is not clear why the parties do not wish to proceed. (The applicant has put the Review Officers' orders in dispute; since there are no responses filed in any of these applications, we do not know whether the respondents also dispute the orders or not.)

11. Accordingly, we require further submissions from the parties explaining why it would or might be of assistance to adjourn these matters pending the determination of the *Women's College Hospital* cases, *supra*. At the same time, the parties should clarify the nature of their request for an adjournment. Their submissions are to be filed with the Tribunal within 21 days of the date hereof, with a copy sent to the other party.

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**0091-90** Family and Children's Services of The District of Thunder Bay Applicant v. Canadian Union of Public Employees and Ministry of Community & Social Services Respondents

**Before:** Patricia Hughes, Alternate Chair, and Members Janet Slone Taylor and Bruce Budd

**Appearances:** Fred J.W. Bickford and James L. Dubray for the Applicant, John Elder and Jack Bird for the Respondent, Canadian Union of Public Employees, Stephen Patterson for the Respondent, Ministry of Community and Social Services, Leslie Macleod and Barbara Hershorn for the Pay Equity Office

**Cite As: Thunder Bay Family and Children's Services** (1990), 2 P.E.R. 27

**PEHT - Hearing - Jurisdiction**

**The Applicant challenged the jurisdiction of a Review Officer to determine a "who is the employer" question, and the Officer asked for the submissions of all parties on the question. Prior to the Officer's receipt of all the submissions, the Applicant applied to the Tribunal, asking it to determine whether the Officer had jurisdiction. The issue was whether the question of the Officer's jurisdiction was properly before the Tribunal.**

**The Tribunal held that the application was premature.**

**The Review Officer had instituted a process under s. 16(1) of the *Act* relating to her jurisdiction which was not completed. There is no telling where that process would have led. The question of the Review Officer's jurisdiction to make an order in relation to the employer cannot come into play until there is a failure to effect a settlement. Parties should not be able to circumvent the settlement process envisioned by the Act simply by asserting that they will not settle. There is nothing apparent in the *Act* that permits parties to by-pass Review Services and bring questions directly to the Tribunal. This determination is without prejudice to the matter being brought back before the Tribunal at a later stage.**

**T.É.S. - Audience - Compétence**

**L'auteur de la requête a contesté le pouvoir d'une agente de révision d'identifier un employeur. L'agente a demandé aux parties de lui présenter des observations sur cette question. Avant que l'agente de révision ait reçu toutes les observations, l'auteur de la requête a demandé au Tribunal, par voie de requête, de déterminer si l'agente de révision avait compétence pour ce faire. La question dont était saisi le Tribunal était la suivante : est-il approprié que le Tribunal tranche la question de la compétence de l'agente de révision.**

**Le Tribunal a statué que la requête était prématurée.**

**L'agente de révision avait entrepris une démarche en vertu du paragraphe 16(1) de la *Loi* en ce qui concerne sa compétence. Cette démarche n'était pas terminée et il était impossible d'en préciser les résultats éventuels. La question de déterminer si l'agente de révision est compétente pour donner un ordre en ce qui concerne l'employeur ne peut pas entrer en ligne de compte tant qu'il n'y a pas eu défaut d'en arriver à un règlement. Les parties ne devraient pas pouvoir contourner le processus de règlement prévu par la *Loi* en affirmant simplement qu'elles refusent d'en arriver à un règlement. Aucune disposition de la *Loi* ne permet aux parties de passer outre aux Services de révision et de soulever des questions directement auprès du Tribunal. La présente décision ne porte pas atteinte aux droits d'une partie de saisir le Tribunal de l'affaire, une autre fois, à une étape ultérieure.**

## DECISION OF THE TRIBUNAL, JULY 13, 1990

1. On December 22, 1989, one of the respondents herein, the Canadian Union of Public Employees ("C.U.P.E.") filed with the Commission a notice under subsection 14(6) of the *Pay Equity Act, 1987* ("the Act") that "the employer" and itself had failed to agree on a pay equity plan. Family and Children's Services of Thunder Bay ("Family and Children's Services"), the applicant before the Tribunal, and the Ministry of Community and Social Services ("the Ministry"), the second respondent herein, were also participants in the Review Services process. It is evident that Family and Children's Services, the Ministry, and C.U.P.E. were at odds as to the identity of the employer with respect to the employees on whose behalf C.U.P.E. and "the employer" were to negotiate a pay equity plan and that that issue was before the Review Officer assigned to the case.

2. By an application to the Tribunal dated May 8, 1990, Family and Children's Services requested that the Tribunal determine whether or not the Review Officer had jurisdiction under the Act to determine or "adjudicate" the issue of "who is the employer". The Ministry joined in the challenge to the Review Officer's jurisdiction. In light of the implications for the role of Review Services arising out of this application, the Pay Equity Office ("the Office") was given notice of the application to permit it to make legal representations. Both C.U.P.E. and the Office submitted that the Tribunal does not have jurisdiction at this stage in the process to determine the scope of the Review Officer's jurisdiction and they requested that the question be referred back to the Review Officer to be decided.

3. There were, then, two questions before us. The "main" or substantive question is the subject of the application to the Tribunal: does a Review Officer have jurisdiction under the Act to determine who "the employer" is? The second question was raised as an objection to our hearing the main issue, at least at this time: is it appropriate for the Tribunal to determine the question of the Review Officer's jurisdiction given the stage of the Review Service process at which the application was filed with the Tribunal?

4. The participants disagreed about how we should proceed. We ruled that at this point we would hear submissions only on whether we should, as a matter of the requirements of the Act or as a matter of our discretion, refer the matter back to Review Services. Accordingly, the participants restricted their submissions to that question and our decision does not address either the jurisdiction of the Review Officer to determine "the employer" or the scope of or limitations on the Tribunal's jurisdiction to determine "the employer" (which issue was raised by C.U.P.E. as a concomitant to the Review Officer's legal competence to decide the question). Put another way, we have restricted our analysis at this stage to whether, in the circumstances of this case, the matter of the Review Officer's jurisdiction is properly before the Tribunal.

5. After C.U.P.E. had filed the subsection 14(6) notice, the Review Officer appointed to the matter, pursuant to subsection 16(1) of the Act, scheduled a meeting for April 23, 1990; at that meeting, Family and Children's Services challenged the Review Officer's jurisdiction to determine the issue of the

appropriate employer. The Review Officer directed that the parties file submissions on her jurisdiction to decide the employer question and she established, it is not disputed on agreement of all concerned, a timetable for filing of the submissions. Family and Children's Services and the Ministry were to file submissions by May 3, 1990 and they did file submissions. C.U.P.E. was required to file its submissions by May 17, 1990 and there was provision for reply from the other two parties. But on May 4, 1990, Family and Children's Services filed an application with the Tribunal (Tribunal File No. 0089-90); it subsequently filed the application before us in Tribunal File No. 0091-90; it is an amended version of the initial application which was withdrawn by the applicant (notification to other participants by Registrar's letter dated May 11, 1990). No dispute arises out of that amendment and we make no further reference to it.

6. Following the filing of Family and Children's Services' application to the Tribunal, the process in Review Services came to a halt. There was some dispute as to the reason for that development, but on any version, the process in Review Services has not continued; the reason is not, for our purposes, relevant. It is clear that the process instituted by the Review Officer was truncated before it could have any effect.

7. Under section 16(1), when the Commission "is advised by an employer or a bargaining agent that no agreement has been reached on a pay equity plan under section 14", "a review officer shall investigate the matter and endeavour to effect a settlement". Failure to effect a settlement is to result in the Review Officer's "by order, decid[ing] all outstanding matters".

8. Counsel for C.U.P.E., the Ministry, and Family and Children's Services all urged us to apply the criteria set out in *Haldimand-Norfolk (No. 1)* (1989) 1 P.E.R. 1, in which the Tribunal held that the Tribunal had jurisdiction to decide whether a Review Officer had been able to effect a settlement under paragraph 25(1)(a) of the Act. Although counsel for the Office maintained that neither the parties nor the investigating Review Officer should be limited by the particular section referred to by a party seeking the assistance of Review Services, she also took the position that paragraph 25(1)(a) does not apply in this case because we are dealing neither with a "complaint" nor with a lack of an order under subsection 24(3) of the Act. Counsel for the Ministry agreed that we should not place too much emphasis on the fact that the matter was placed before Review Services by virtue of a notice under subsection 14(6) and argued that the use of the term "complaint" in paragraph 25(1)(a) was not significant.

9. For our purposes, the determination of the limited question of referral back to Review Services, we do not need to consider the relationship, if any, between sections 16 and 25 nor the significance of the Act's setting out specific procedures in section 16 in relation to a notice filed under subsection 14(6) and specific procedures in section 23 in cases of complaints filed under section 22. We note, however, that such issues, and others referred to by the participants in this matter, may be relevant to the determination of the main question of the Review Officer's jurisdiction to decide the employer question, should it be brought back before the Tribunal.

10. We conclude that the application by Family and Children's Services is premature at this time. The Review Officer had instituted a process relating to her jurisdiction which was not completed. We do not know where that process would have led. Furthermore, although we leave open the question of what the phrase "all outstanding matters" in subsection 16(2) encompasses, we cannot see how the question of the Review Officer's jurisdiction to *determine*, that is, make an *order*, in relation to the employer can come into

play until there is a failure to effect a settlement. The attempt to effect a settlement does not involve any determination by the Review Officer.

11. In this case, we are faced with two important interests: the salience of the settlement process in the resolution of pay equity disputes; and the principle that decision-makers not exceed the jurisdiction granted them under the Act.

12. In general, the Review Office is responsible both for trying to settle disputes and, where the parties are unable to agree, for issuing orders. The settlement process is integral to the efficient functioning of the Commission. It is consistent with the underlying thrust of the legislation that pay equity is to be achieved by the relevant parties themselves. Where the parties cannot agree, the legislation provides for further efforts to reach agreement through discussions with a Review Officer. Under subsection 16(1), the Review Officer "*shall* investigate the matter and endeavour to effect a settlement" (emphasis added); under subsection 23(1), the Review Officer "shall investigate the complaint and *may* endeavour to effect a settlement" (emphasis added). Regardless of whether the difference in wording has any significance, it is clear that there is at the very least a discretion in, and perhaps an obligation on, the Review Officer to encourage the parties to settle the dispute between (or among) them. We agree that it is for the Tribunal to decide whether the preconditions of its holding a hearing under paragraph 25(1)(a) have been met, as the panel in *Haldimand-Norfolk (No. 1)*, *supra*, determined.

13. Whether the same or similar criteria apply under section 16 with respect to efforts to reach a settlement does not arise in this case. The process was truncated to such an extent that there was not an opportunity to begin the process in any real way. Although we were told by counsel for the Ministry, in particular, that these parties would not settle the employer question, we cannot accept that parties should be able to circumvent the settlement process envisioned by the Act simply by asserting they would not settle: given the way in which matters proceeded, it is impossible to say what would have happened had the process continued with discussions. Possibly, the Review Officer could effect a settlement under which the employer question disappeared and thus her jurisdiction to determine the question might never arise. Whether that is likely in these particular circumstances or not, we do not believe that we should permit parties effectively to by-pass Review Services this readily by assuming jurisdiction to hear this application at this time.

14. Neither counsel for Family and Children's Services nor for the Ministry was able to direct us to any provision in the Act which, in the circumstances of this case, permits them to by-pass Review Services and bring this question directly to the Tribunal.

15. Counsel for Family and Children's Services did refer us to subsection 30(1) of the Act which grants the Tribunal "exclusive jurisdiction . . . to determine all questions of fact or law that arise in any matter before it"; but that jurisdiction comes into effect only when a matter is properly before the Tribunal. It is clearly not available to give the Tribunal jurisdiction over any matter simply because a party places the matter before the Tribunal. Once there is a matter properly before the Tribunal, subsection 30(1) establishes the parameters of the the Tribunal's competence to deal with the matter. It may be that there are circumstances in which the "employer question" could properly be brought directly to the Tribunal; however, we believe that that determination should not be made, at least in the first instance, when the settlement process at Review Services has been almost completely disregarded, as it has here.

16. In this regard, we do not accept the Ministry's characterization of "the matter" before the Review Officer as whether the Review Officer had jurisdiction to decide the employer question. "The matter", as it appears in subsection 16(1), relates to notice that there has been no agreement on a pay equity plan. That is "the matter" to be investigated by the Review Officer and on which she is to "endeavour to effect a settlement".

17. For all these reasons, we believe that the appropriate course is to permit the Review Services process under section 16 to continue. We therefore decline to deal with this application on the grounds that it is premature. As we have already said, "the matter" before the Review Officer is the notice of failure to reach agreement on a pay equity plan. We are not in a position to determine when efforts to effect a settlement may fail, if they do, and thus we decline to limit our referral to the question of the Review Officer's jurisdiction, as we were requested to do by counsel for the Ministry. We are not satisfied that we have jurisdiction to do so, in any event.

18. This determination is without prejudice to the applicant's bringing this matter before the Tribunal at a later stage, nor is it to be read as any determination of the Review Officer's scope of decision-making under subsection 16(2). This panel is seized of this matter should it be brought back to the Tribunal.

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**0087-90 0094-90** Her Majesty the Queen in Right of Ontario (Ministry of Community and Social Services) Applicant v.Children's Aid Society of the City of Kingston, and the County of Frontenac and Canadian Union of Public Employees, Local 2175 Respondents

**Before:** Beth Symes, Chair, and Members Bruce Budd and Donald Dudar

**Appearances:** Stephen Patterson for the Applicant, Her Majesty the Queen in Right of Ontario (Ministry of Community and Social Services), Deborah Leighton for the Respondent, Children's Aid Society of the City of Kingston, and the County of Frontenac, Cathy Lace and Margaret Leighton for the Respondent, Canadian Union of Public Employees, Local 2175

**Cite As: Kingston and Frontenac Children's Aid Society** (1990), 2 P.E.R. 31

**PEHT - Hearing - Jurisdiction**

**Practice and Procedure - Production of Documents**

The Applicant objected to a Review Officer's order identifying it as the pay equity employer of the employees in the bargaining unit represented by the Respondent, CUPE, Local 2175. Prior to the first day of hearing, CUPE wrote to the Applicant and the Respondent, Children's Aid Society ("CAS") requesting the production of certain documents. Production was refused. The issues before the Tribunal were whether it had jurisdiction to order production of the requested documents, and if so, which documents, if any, were to be produced.

The Tribunal ordered production of the requested documents.

The parties agreed to treat the letter requesting production of the documents as if it had been a valid *subpoena duces tecum*. The Tribunal has the power to order a party to produce documents under s. 29(2)(b) of the *Act*, which provides that the Tribunal may make rules for the conduct and management of its own affairs and for the practice and procedure to be observed in matters before it, and under s. 12(1) of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484 which provides that the Tribunal may require a party to produce documents in evidence at a hearing. The production of documents pursuant to a *subpoena duces tecum* is a process that compels someone to produce documents. To be received in evidence, such documents must be proved. Accordingly, the documents need not necessarily be produced at the hearing. It is more practical, efficient and fair if the documents are produced in advance of the next day of hearing.

With respect to the issue of which documents must be produced, the Tribunal is guided by the principle that the power to compel production of documents is substantial and must be exercised in a prudent manner. The Tribunal will not allow fishing expeditions and will ensure that a request for production does not amount to harassment. Thus, a party will be compelled to produce documents which are arguably relevant to the facts, events and issues in dispute. The matters are determined by the pleadings and the evolving jurisprudence. In the present case, the request is not in the nature of a fishing expedition, and the information requested is relevant to the issue of the nature of the services provided by the CAS, a matter placed in issue by CUPE. The concerns raised by the CAS respecting the confidentiality of the information contained in the documents has been allayed by the undertaking of counsel for CUPE that the documents will not be used for a collateral or ulterior purpose.

**T.É.S. – Audience – Compétence**

**Pratique et procédure – Production de documents**

**L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui l'identifiait comme l'employeur, aux fins de l'équité salariale, des employés compris dans l'unité de négociation représentée par l'intimé, à savoir la section locale 2175 du Syndicat canadien de la fonction publique. Avant le premier jour d'audience, le Syndicat a demandé, par écrit, à l'auteur de la requête et à l'intimé, la Société d'aide à l'enfance («la Société») de produire certains documents. Les parties en question ont refusé de produire ces documents. Les questions dont était saisi le Tribunal étaient les suivantes : le Tribunal a-t-il compétence pour ordonner la production des documents demandés et, dans ce cas, quels documents doivent être produits?**

**Le Tribunal a ordonné la production des documents demandés.**

**Les parties ont convenu de considérer la lettre relative à la production de documents comme une assignation à produire valide. Le Tribunal a le pouvoir, en vertu de l'alinéa 29(2)b) de la *Loi*, d'ordonner à une partie de produire des documents. En effet, cet alinéa prévoit que le Tribunal peut établir des règles concernant la conduite et la gestion de ses affaires, ainsi que des règles de pratique et de procédure à suivre relativement aux questions dont il est saisi. De plus, le paragraphe 12(1) de la *Loi sur l'exercice des compétences légales*, qui constitue le chapitre 484 des L.R.O. de 1980, prévoit que le Tribunal peut exiger d'une partie qu'elle produise des documents en preuve dans le cadre d'une audience. L'assignation à produire est un acte de procédure qui exige la production de documents. Pour être admissibles en preuve, il faut que l'authenticité de ces documents soit établie. Par conséquent, il n'est pas nécessaire que les documents soient produits à l'audience. Il est plus pratique, plus efficace et plus juste si les documents sont produits avant le jour d'audience suivant.**

**En ce qui concerne la nature des documents qui doivent être produits, le Tribunal se laisse guider par le principe voulant que le pouvoir d'exiger la production de documents soit important et doive être exercé d'une manière prudente. Le Tribunal n'autorise pas les interrogatoires à l'aveuglette et veille à ce qu'une demande de production de documents ne corresponde pas à du harcèlement. Une partie peut donc être tenue de produire des documents qui ont trait aux faits, aux événements et aux points en litige. Les actes de procédure et le corps de jurisprudence changeant définissent les questions. Dans le cas présent, la demande ne correspond pas à un interrogatoire à l'aveuglette et les renseignements demandés sont liés à la nature des services fournis par la Société, un point que le Syndicat juge litigieux. L'avocat du Syndicat s'est engagé à ne pas utiliser les documents à des fins accessoires ou secrètes; cet engagement a affaibli les préoccupations de la Société concernant la confidentialité des renseignements contenus dans les documents.**

## DECISION OF THE TRIBUNAL, AUGUST 3, 1990

1. The correct names of the Respondents are the "Children's Aid Society of the City of Kingston, and the County of Frontenac" and the "Canadian Union of Public Employees, Local 2175". The style of cause is amended accordingly.

2. Her Majesty the Queen in Right of Ontario (Ministry of Community and Social Services) ("the Province") requested a hearing before the Tribunal with respect to an Order of a Review Officer dated March 12, 1990. The Review Officer ordered that, for pay equity purposes, the Province, in the County of Frontenac, is the employer of the Canadian Union of Public Employees, Local 2175 members and directed the parties to negotiate a pay equity plan. It was the Province's position that the Order was wrongly decided and that the employer of the employees in question was the Children's Aid Society of the City of Kingston, and the County of Frontenac ("the CAS"). The CAS took the same position as the Province.

3. The Canadian Union of Public Employees, Local 2175 ("CUPE") maintained that the Review Officer was correct and that the Order should be confirmed by the Tribunal.

4. It was CUPE's submission that the Tribunal should apply the four criteria established in *Haldimand-Norfolk (No. 3)* (1989), 1 P.E.R. 17 to the fact situation in this case in order to determine, for pay equity purposes, who is the employer of the employees in dispute. It was the Province's position that the four criteria should be modified.

5. The Province and the CAS objected to producing documents requested by CUPE. The request for documents took the form of two letters, dated July 3, 1990 and July 10, 1990 from CUPE to the Province and to the CAS. These letters are attached as Appendix "A" to this decision.

6. The parties agreed that the Tribunal should treat the requests for documents as if CUPE had issued a summons *duces tecum* and that the objection would be dealt with on the first day of hearing, July 26, 1990.

**ISSUES:**

7. There are two issues in dispute:

1. Does the Tribunal have the jurisdiction to order the Province and the CAS to produce documents? If yes,
2. What documents must be produced?

**Does the Tribunal have the jurisdiction to order production?**

8. The Province and the CAS took the position that the Tribunal has no authority to compel production of documents for the purpose of discovery. It was their position that there is no right to discover at common law and that the Tribunal is limited by statute to compelling a witness to attend at a hearing and requiring the witness to produce the documents in evidence at the hearing *Guru v. McMaster University* (1981), 2 C.H.R.R. D/253; *Joseph v. North York General Hospital* (1982), 3 C.H.R.R. D/854; *Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.* (1989), 59 D.L.R. (4th) 384 (Fed. C.A.).

9. CUPE's position was that the Tribunal has the same authority to compel the production of documents as does the Ontario Labour Relations Board under section 103(2)(a) of the *Labour Relations Act*, R.S.O. 1980, c.228 as amended and as do arbitrators appointed pursuant to section 44 of that *Act*.

10. CUPE's position is that the human rights cases are not binding on the Tribunal, and are distinguishable on the basis that the party seeking production in those cases, the Human Rights Commission, is able at the complaints stage to require the production of documents *Human Rights Code, 1981*, S.O. 1981, c.53, as amended section 16(2)(b). The Human Rights Commission is a party before a board of inquiry and has carriage of the complaint (section 38(2)(a)). Under the *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended, review officers are given the power to request production of documents (section 34(3)(b)). CUPE stated that such information is not always shared with the parties. Neither Review Services nor the Pay Equity Office is a party in this proceeding. Unlike the Human Rights Commission, neither the Pay Equity Office nor the Review Officer has carriage of this case and neither is defending this order. Finally, CUPE does not have the discovery and production powers given to Review Officers.

11. In *Canadian Pacific Airlines Limited v. C.A.L.P.A.*, the Canada Labour Board received an application from a party and referred the matter to an investigating officer for investigation. The investigating officer requested certain documentation for the purposes of the Board's own pre-hearing investigation. One of the parties refused to produce the requested documents. The Board then ordered the party to produce the documents, which order was issued without a hearing. The Federal Court was concerned that persons who objected to producing documents could be subject to penalties for refusing to obey such an order, without having been given the opportunity to voice their objections at a hearing and set aside the Board's order.

12. In this case, the hearing has begun and CUPE has requested the production of documents by two letters. These letters do not meet the formal requirements necessary to constitute a *subpoena duces tecum*, but the parties have nonetheless agreed that, for the purpose of this hearing, the Tribunal is to deal with these letters as if they were an application in the nature of a *subpoena duces tecum*; the parties agree to be bound as if a summons had been properly issued and served. The Tribunal has dealt with the issue on this basis.

13. The Tribunal has the power to order a party to produce documents pursuant to section 29(2)(b) of the *Pay Equity Act, 1987*:

> ... the Hearings Tribunal
>
> (b) may make rules for the conduct and management of its affairs and for the practice and procedure to be observed in matters before it;

and pursuant to section 12(1) of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484:

> A tribunal may require any person, including a party, by summons,
>
> (a) to give evidence on oath or affirmation at a hearing; and
>
> (b) to produce in evidence at a hearing documents and things specified by the tribunal,
>
> relevant to the subject-matter of the proceeding and admissible at a hearing.

14. The Tribunal has the authority to compel the production of documents by requiring them to be produced in evidence at the hearing. The Labour Relations Board has well established jurisprudence of ordering production of documents to assist in the orderly disposition of cases. Although the wording of section 103(2) of the *Labour Relations Act* is somewhat different from the words in section 12(1)(b) of the *Statutory Powers Procedure Act*, the Tribunal is not persuaded that there is any substantive difference between the two sections. Moreover, the Tribunal has been given statutory authority to make rules for the conduct and management of its affairs and for the practice and procedure to be observed in matters before it (section 29(2)(b) of the *Act*). The Tribunal also has implicit power or jurisdiction to order what is of practical necessity in order for the Tribunal to hear its cases in a manner which is accessible, fair and efficient *Re Interprovincial Pipe Line Ltd. and National Energy Board* (1977), 78 D.L.R.(3d) 401 (Fed. C.A.) at p. 406. The production of such documents is the most fair and efficient manner to deal with what appears to be a case of complex and detailed facts.

15. The policy of the Tribunal is to limit "hearing by ambush". To that end, the Tribunal's Rules of Practice require a party to set out in advance of a hearing, the basis of its case. The production of documents is consistent with this requirement.

16. What is the form or nature of this production? The Province and the CAS submitted that the only way to compel production of these documents is to require a witness to attend the hearing. That witness must bring with him or her the requested documents. They submitted that those documents are then admitted as evidence in the case.

17. A *subpoena duces tecum* is a process that compels someone to bring documents to the hearing. There is no need to swear that person, if the document requires no proof or is to be proved by other means. In such a case, the opposite party is not given the opportunity to cross-examine. It does not follow that because persons are called upon to produce documents that they must be called upon to give evidence. The summoning party is entitled to require the person to produce the document, without putting them on the stand to speak about their general knowledge of the case *Heart Construction Co. Ltd.*, [1983] O.L.R.B. Rep. Jan. 84.

18. A document which is produced pursuant to a *subpoena duces tecum* is not, on that basis alone, evidence in the case. Such a document must be proved and must be relevant to the issues in dispute.

Although a document may be produced, it is possible that none of the parties will seek to introduce it as evidence, or that the Tribunal may rule that it is not relevant. The production of documents pursuant to a *subpoena duces tecum* is separate from the receipt of documents as evidence in a hearing. Therefore, the Tribunal has the authority to order the production of documents without requiring that the person in possession of the documents be sworn as a witness. Although the documents are produced pursuant to a summons, they are not evidence in a hearing until proved and ruled admissible *Shaw-Almex Industries Limited*, [1984] O.L.R.B. Rep. April 659 at para. 19.

19. The hearing has begun. CUPE has sent letters to the Province and the CAS requesting production of the documents. The Province and the CAS asked the Tribunal to deal with this matter as letters in the nature of an application for a *subpoena duces tecum*.

20. The Province and the CAS took the position that the documents need not be produced until the next day of hearing, September 10, 1990. The Tribunal rejects this submission. It is more practical, more efficient and more fair if the Tribunal orders the production of documents in advance of the next day of hearing. If the documents were not to be produced until the next hearing day, CUPE would then be entitled to an adjournment to review the documents produced, and that would be an inefficient use of Tribunal resources and would add to the cost and time delays in this case. The *Act* required these parties to negotiate and post the pay equity plan for this bargaining unit on January 1, 1990. Further delay in resolving this issue is unwarranted.

21. The Tribunal acknowledges that the production of documents takes staff time and resources, and is concerned about the length and complexity of pay equity cases. The Tribunal is also committed to a hearing process which is accessible, fair, and efficient. It is more consistent with those goals to require the parties to produce documents than for the parties to receive documents on a piecemeal basis.

**What documents must be produced?**

22. The Tribunal's power to compel the production of documents is a substantial one and must be exercised in a prudent manner. A *subpoena duces tecum* must identify the documents requested with sufficient particularity. The summons may not be used to discover whether there is a case at all, i.e. a fishing expedition, but may be used to obtain evidence to support a case. The Tribunal recognizes that the process of gathering the documents requested is time consuming and labour intensive. A summons will be set aside if great numbers of documents are requested and if it appears that they are not sufficiently relevant to the issues in dispute *The Becker Milk Company Limited*, [1974] O.L.R.B. Rep. Oct. 732; *Shaw-Almex Industries Limited*, [1984] O.L.R.B. Rep. April 659; *Mollenhauer Limited*, [1987] O.L.R.B. Rep. Sept. 1156.

23. The Tribunal does not have a process of discovery as found in the rules of practice of civil courts, however, it recognizes that some "discovering" will go on *The Becker Milk Company Limited*, para. 8; *Mollenhauer Limited*, para. 5. The Tribunal will scrutinize carefully any request for documents, to ensure that the request does not amount to harassment of a party. The Tribunal is mindful that onerous demands for production may limit genuine accessibility to its hearings.

24. A party will be compelled to produce a document if it is arguably relevant to the facts, events and issues in dispute. The facts, events and issues in the case are determined by the application, the responses, and the replies filed by the parties and the evolving jurisprudence.

25. There is no allegation that CUPE is fishing with these requests.

26. The Province and the CAS object to producing documents which establish the minimum daily rates for foster parents on the basis that such documents are not relevant to the issues in dispute. It was the position of the Province and the CAS that foster parents are not employees of the CAS, but instead are independent contractors. Foster parents are not in the bargaining unit represented by CUPE, which they say, is the subject matter of this inquiry. Therefore, they submit that the documents concerning foster parents ought not be produced as they are not material to the issues in dispute.

27. CUPE's position was that foster parenting is one of the essential services delivered by the CAS. They allege that the involvement of the Province in the delivery of this service goes to the nature of the service the CAS provides and to the issue of overall financial responsibility. CUPE submitted that it intends to use these documents to show how the Province regulates every aspect of the CAS's operations.

28. The CAS is responsible for the placement of children in need of protection. The *Child and Family Services Act, 1984* S.O. 1984, c.55 as amended, contemplates that children may be placed with foster parents and the regulations authorize the CAS to enter into written foster care agreements with foster parents, which set out the remuneration to be paid. It is the Tribunal's decision that the information requested is arguably relevant to determining the nature of the services provided by the CAS, an issue which has been raised by CUPE. Therefore, the documents requested must be produced.

29. Although the Province and the CAS are willing to produce the other documents requested by CUPE for the time period from November 1985 to the present, they object to producing these documents for the period 1979 to October 1985. It was their position that the statute governing the operations of the CAS, the *Child Welfare Act*, R.S.O. 1980, c.66, was repealed in November 1985 and replaced by the *Child and Family Services Act, 1984*. It will be their position that the relationship between the CAS and the Province has been governed by the latter *Act* for a period of five years. They submitted that a five year time window was more than sufficient to view the operations of the CAS and its relationship with the Province. The Province and the CAS submitted that it would be onerous to locate these documents, and that documents beyond the five year time window are not sufficiently relevant to warrant the time and expense. This hearing will be long and complex, and a means to scope the hearing would be to limit production of documents to the last five years.

30. CUPE alleged that the enactment of the *Child and Family Services Act, 1984* had no substantial effect on the operations of the CAS nor on the relationship between the CAS and the Province. CUPE submitted that their understanding of the relationship between the CAS and the Province flowed from the negotiations for the first collective agreement in 1979. Further, CUPE maintained that the employees' perception as to who is their employer was formed during the initial rounds of collective bargaining. Finally, CUPE submitted that a five year snapshot was too short a time span to get an accurate picture of the relationship between the Province and the CAS and that it would be unfair to scope the case so early.

31. The Tribunal is persuaded that the documents prior to November 1985 are arguably relevant to the facts and issues in dispute. It is too early in the hearing for the Tribunal to determine whether the legislated change in 1985 had any impact on the operations of the CAS or on the relationship between the Province and the CAS. To establish this, the parties will need to call evidence. At this point in the hearing, the Tribunal cannot say that documents and events which are prior to the legislative changes in 1985 are irrelevant to the issues in this case. It is CUPE's position that documents and events from the time period from 1979 to October 1985 will be relevant evidence to the issues in dispute. It would be premature for the Tribunal to rule out these documents at this time.

32. The CAS raised the concern of confidentiality of the documents produced. The parties acknowledge that the CAS is under statutory obligation to maintain the confidentiality of its client records. The CAS was also concerned about the confidentiality of personal information that would be revealed in documents relating to management decision making. There is an implied undertaking made to the Tribunal by the party requesting the documents that the documents will not be used for a collateral or ulterior purpose. In addition, the solicitor for CUPE gave the Tribunal her explicit undertaking that she would meet with counsel for the CAS in order to deal with the confidentiality issues.

33. The Tribunal hereby orders the Province and the CAS to produce the documents requested in CUPE's letters of July 3, 1990 and July 10, 1990 to CUPE by August 27, 1990. The Province and the CAS may provide copies of the documents to CUPE. In the alternative, the Province and the CAS may allow CUPE, on reasonable notice, access to review and to photocopy the documents.

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**0116-90 IN THE MATTER** of a Notification under Subsection 23(2) of the *Pay Equity Act, 1987* relating to Pat Turner and Wentworth County Board of Education

**Before:** Patricia Hughes, Alternate Chair, and Members Janet Slone Taylor and Bruce Budd

**Cite As: Re Wentworth County Board of Education** (1990), 2 P.E.R. 37

**Practice and Procedure - Notifications**

A Review Officer notified the Tribunal under s. 23 (2) of the *Act* that she had been unable to settle an employee's complaint of a violation of s. 9(2) of the *Act* and that she would not be disposing of the matter by order. The issue was whether the Tribunal was required to hold a hearing on the basis of the notification alone.

The Tribunal held that it would not proceed with the complaint until it received an application.

By virtue of s. 25 (1) (a) of the *Act*, the Tribunal is required to hold a hearing when it has received notice under s. 23(2). An application initially made to the Commission and upon which Review Services acts is not the application upon which a case is argued before the Tribunal. When the Tribunal hears a matter, it does so afresh and decides the issues solely on the evidence and arguments presented by the parties before it. The application tells all participants of the detailed nature of the complaint, informs the respondent of the allegations it must answer and provides the Tribunal with information which helps it schedule a hearing. Accordingly, if the complainant wishes to proceed, she must file an application in the proper form with the Tribunal.

**Pratique et procédure - Avis**

L'agente de révision a informé le Tribunal, en vertu du paragraphe 23(2) de la *Loi*, qu'elle n'avait pas pu régler la plainte d'une employée concernant une infraction au paragraphe 9(2) de la *Loi* et qu'elle ne donnerait pas d'ordre. Le point en litige était le suivant : le Tribunal est-il tenu de tenir une audience à la suite uniquement de cet avis?

Le Tribunal a statué qu'il n'allait pas donner suite à la plainte tant qu'une requête ne lui serait pas présentée.

Le Tribunal est tenu, en vertu de l'alinéa 25(1)a) de la *Loi*, de tenir une audience quand il a reçu un avis en vertu du paragraphe 23(2). La requête déposée en premier lieu auprès de la Commission et à laquelle les Services de révision donnent suite ne constitue pas une requête au Tribunal. Quand le Tribunal est saisi d'une question, il doit s'agir d'une nouvelle requête et il tranche les questions en fonction exclusivement des preuves et des plaidoiries des parties qui lui sont présentées. La requête renseigne tous les participants sur la nature détaillée de la plainte, informe l'intimé des allégations auxquelles il doit répondre et fournit au Tribunal les renseignements dont il a besoin pour prévoir une audience. En conséquence, si l'auteure de la plainte veut poursuivre l'affaire, elle doit déposer une requête en bonne et due forme au Tribunal.

**DECISION OF THE TRIBUNAL, AUGUST 27, 1990**

1. Section 23 of the *Pay Equity Act, 1987* ("the Act") provides as follows:

> **23.**-(1) Subject to subsection (2), when the Commission receives a complaint, a review officer shall investigate the complaint and may endeavour to effect a settlement.
>
> (2) The review officer shall notify the parties and the Hearings Tribunal as soon as he or she decides that a settlement cannot be effected and that he or she will not be making an order under subsection 24(3).

2. On August 22, 1990, the Tribunal received notification under subsection 23(2) with respect to a complaint made to the Pay Equity Commission alleging that the Wentworth County Board of Education had contravened subsection 9(2) of the Act in its conduct towards Pat Turner. Ms. Turner was an applicant in the proceedings at Review Services.

3. When it has received a notification under subsection 23(2), the Tribunal is required to hold a hearing, by virtue of paragraph 25(1)(a) of the Act (also see section 1.04 of the Tribunal's Rules of Practice). No one has filed an application with the Tribunal in these circumstances, as does, for example, a party objecting to an order made by a Review Officer. The application tells all participants of the detailed nature of the complaint, and in particular informs the respondent of the allegations it must answer, as well as provide the Tribunal with information which helps it schedule the hearing. The application initially made to the Commission and upon which Review Services acts is not the application upon which the case is argued before the Tribunal which, as it has said, hears the matter afresh and decides it solely on the evidence and arguments as presented by the parties before it.

4. Accordingly, if Ms. Turner wishes to proceed with a complaint before the Tribunal, she needs to file an application in the proper form with the Tribunal which will then set in place its usual procedures.

5. The Tribunal will take no further action until it has received an application.

6. This has been the first time that the Tribunal has received a notification under subsection 23(2) with respect to a subsection 9(2) complaint. It therefore seemed useful to explain why the Tribunal is not immediately scheduling a hearing. In future cases, the Registrar may advise the parties named therein that the Tribunal has received a Notification under Subsection 23(2) and further advise the applicant named in the Notification that the Tribunal will not proceed until it has received an application in accordance with the Tribunal's Rules of Practice.

**0106-90 0114-90** New Liskeard Police Association, Applicant v. New Liskeard Board of Police Commissioners, Respondent; New Liskeard Board of Police Commissioners, Applicant v. New Liskeard Police Association, Respondent

**Before:** Patricia Hughes, Alternate Chair, and Members Janet Slone Taylor and Melda Okoye

**Appearances:** Richard Houston, Steven Loach, Dwight Thib, J.D. Brown and Carole Brown for the Applicant, New Liskeard Police Association S.A. Bernofsky, Rheal Mendard, Mac Hamilton and Russ Tench for the Respondent, New Liskeard Board of Commissioners of Police

**Cite As: New Liskeard Board of Police Commissioners (No.1) (1990), 2 P.E.R. 39**

### PEHT - Jurisdiction - Concurrent with Arbitrator

The respondent in a dispute being heard by the Tribunal asked the Tribunal to rule that the dispute could not proceed to arbitration if one or the other of the parties did not like the result of the hearing.

The Tribunal declined to issue the order.

There are times when the subject matter of a complaint brought under a statute to be dealt with by an administrative tribunal has the character of a dispute falling squarely within the terms of a collective agreement between the parties. The tribunal may defer the matter to arbitration, remaining seized to enable it to deal with any issues outstanding after the arbitration has been decided. In such cases, the tribunal is simply deferring to a more appropriate forum, as it has the jurisdiction to do. But the Tribunal does not have the jurisdiction to prohibit the parties from exercising rights which may accrue to them from other sources.

### Practice and Procedure - Witnesses - Review Officer

The New Liskeard Police Association ("the Association") complained that the Board of Commissioners of Police ("the Board") contravened s. 9(2) of the *Act* by shortening an employee's lunch break and requiring her to remain on the premises during it. The employer claimed that the change had been made in order to conform to the collective agreement, and had been effected on the advice of a Review Officer. The Board applied to the Tribunal for a hearing objecting to the Review Officer's order that the employee's lunch break be reinstated, and arguing that the Officer was biased. In a letter to the Registrar of the Tribunal, the Board requested the Tribunal's consent to compel the Officer to testify. The Board did not advise the Review Officer or the Pay Equity Office of this request, and they were not present at the hearing. The issues for the Tribunal were whether the Board had followed the proper steps in seeking the Tribunal's consent to have the Officer testify, and if so, whether such consent should be granted.

The Tribunal held that the procedure followed was proper, but refused to grant its consent.

Section 31 of the Act establishes a qualified privilege against the compellability of Review Officers to testify about information they acquire through the exercise of their duties. The Tribunal's power to summon and enforce the attendance of witnesses and to compel them to give evidence or produce documents derives from the *Statutory Powers Procedure Act* and not the *Act*. The inclusion of s. 31 in the *Act* suggests that the persons listed in it stand in somewhat different stead than the ordinary witness. The procedure followed by counsel in this case is consistent with the *Act*. Under the two-step approach, the witness does not have to attend the hearing and the party calling the witness does not have to pay conduct money until the Tribunal gives its consent. The party seeking consent must satisfy the Tribunal that it should give it. The difference between granting consent as a precondition to enforcing compellability and actually enforcing the summons is maintained. Once the Tribunal gives its consent, the normal practice comes into effect.

Section 31 highlights the emphasis placed on confidentiality in the work of the Pay Equity Commission ("the Commission"). The effectiveness of the investigative and settlement processes engaged in by the Review Officers are integral to the successful functioning of the Commission and the legislation. Parties may compromise and take certain positions in the interests of settlement that they would not be willing to take in a hearing. They must feel that they can discuss matters openly and frankly with the Officer and that these disclosures and explanations will not come back to haunt them. Similarly, an Officer may be selective in what she says or how she says it in an attempt to effect a settlement. Too close scrutiny of the process and too much concern by the parties that their comments will be revealed are likely to impair both the investigative and settlement processes.

Requests to call an Officer to testify may be directly related to an attack on the order rather than made in relation to information provided during an investigation or comments made during settlement efforts. The Tribunal has held that it holds a hearing *de novo* when it acts under s. 25(2)(e) of the *Act*. As it does not sit in appeal of the order, the Tribunal has little interest that the Officer had certain thoughts in mind when he or she made the order.

Consent under s. 31 should only be granted in extraordinary circumstances, In this case, to the extent that the Board wishes to call the Officer to elicit testimony that supports its allegation that the Officer was biased, the Tribunal is not prepared to grant consent. Even if the Officer were biased, that is irrelevant to the Tribunal's consideration of the case and is cured by its new hearing. Assuming that the alleged violation of s. 9(2) is properly before the Tribunal, the Board has an onus to show that it acted for reasons other than those listed in s. 9(2). Its best evidence is that provided by the only persons who can actually explain why the lunch break was changed: those who actually made the decision. The Officer's evidence is not relevant to this.

### T.É.S. - Compétence - Arbitre

La partie intimée dans le litige dont était saisi le Tribunal lui a demandé de statuer que le litige ne pouvait pas être entendu par un arbitre si l'une ou l'autre des parties n'était pas satisfaite de l'issue de l'audience tenue.

Le Tribunal a refusé de rendre cette ordonnance.

Il existe des cas où l'objet d'une plainte déposée en vertu d'une loi et qui doit être réglée par un tribunal administratif a la nature d'un litige qui relève carrément de la convention collective conclue entre les parties. Le tribunal peut renvoyer l'affaire à un arbitre tout en continuant d'en rester saisi, ce qui lui permet de trancher tout litige que l'arbitre n'a pas réglé. Dans ces cas, le

tribunal ne fait que renvoyer l'affaire à une entité plus appropriée, ce qu'il a le pouvoir de faire. Toutefois, le Tribunal ne possède pas la compétence nécessaire pour interdire aux parties d'exercer les droits que d'autres sources peuvent leur conférer.

### Pratique et procédure – Témoins – Agent de révision

L'Association de police de New Liskeard («l'Association») s'est plainte que la Commission de police («la Commission») avait enfreint le paragraphe 9 (2) de la *Loi* lorsqu'elle a raccourci la pause-repas d'une employée et lui a demandé de la prendre sur son lieu de travail. L'employeur a prétendu que cette modification avait eu pour but de respecter les conditions de la convention collective et avait été mise en oeuvre suite aux conseils d'un agent de révision. La Commission a demandé une audience devant le Tribunal, car elle contestait l'ordre de l'agent de révision stipulant que la pause-repas de l'employée soit ramenée à sa durée antérieure et elle prétendait que l'agent avait un parti pris. Dans une lettre qu'elle a adressée au greffier du Tribunal, la Commission a demandé au Tribunal de contraindre l'agent à témoigner. La Commission n'a pas communiqué cette demande à l'agent de révision ni au Bureau de l'équité salariale et ceux-ci n'ont pas assisté à l'audience. Le Tribunal devait décider si la Commission avait respecté la procédure appropriée pour obtenir son consentement en ce qui concerne le témoignage de l'agent et, dans l'affirmative, si ce consentement devrait être accordé.

Le Tribunal a statué que la procédure suivie était tout à fait appropriée, mais a refusé de donner son consentement.

L'article 31 de la Loi crée un privilège partiel en ce qui concerne l'obligation, pour les agents de révision, de témoigner en ce qui concerne les renseignements qu'ils ont obtenus dans l'accomplissement de leurs devoirs. Le pouvoir dont dispose le Tribunal pour assigner des témoins, exiger leur comparution et leur ordonner de fournir des preuves ou de produire des documents découle de l'application de la *Loi sur l'exercice des compétences légales* et non de la *Loi*. L'inclusion de l'article 31 dans le texte de la *Loi* donne à entendre que les personnes énumérées dans cet article ont un statut quelque peu différent des témoins ordinaires. La démarche qu'a suivie l'avocat dans la présente affaire est compatible avec la *Loi*. Dans le cadre de la méthode à deux temps, le témoin n'est pas tenu de se présenter à l'audience et la partie qui le convoquen'est pas tenue de lui verser une indemnité de présence tant que le Tribunal n'a pas donné son consentement. La partie qui veut obtenir le consentement du Tribunal doit le convaincre du bien-fondé de sa demande. La différence qui existe entre l'octroi du consentement en tant que condition préalable à l'exécution du pouvoir de contraignabilité et l'exécution véritable de l'assignation à témoigner est maintenue. Dès que le Tribunal donne son consentement, la pratique normale entre en vigueur.

L'article 31 met en lumière l'importance conférée au caractère confidentiel des activités de la Commission de l'équité salariale («la Commission»). L'efficacité des processus d'enquête et de règlement que poursuivent les agents de révision est une composante essentielle du bon fonctionnement de la Commission et de la *Loi*. Les parties peuvent accepter de faire des transactions et adopter certains points de vue en prévision d'un règlement qu'elles ne seraient pas prêtes à adopter lors d'une audience. Elles doivent savoir qu'elles peuvent avoir des échanges francs et honnêtes avec l'agent de révision et que tout renseignement divulgué ou toute explication fournie ne se retournera pas contre elles. Dans le même ordre d'idées, l'agent de révision doit faire attention à ce qu'il dit et à la façon de le dire lorsqu'il essaie d'amener les parties à accepter un règlement. Les processus d'enquête et de règlement ne donneront probablement pas les résultats escomptés si les parties les examinent trop sérieusement et se préoccupent trop de la divulgation de leurs commentaires.

Il se peut que les demandes concernant le témoignage d'un agent aient directement trait à la contestation d'un ordre et n'aient rien à voir avec les renseignements fournis durant l'enquête ni aux commentaires faits durant le processus de règlement. Le Tribunal a statué qu'il tient une nouvelle audience lorsqu'il agit en vertu de l'alinéa 25 (2) e) de la *Loi*. Étant donné qu'il n'entend pas un appel de l'ordre, le Tribunal se soucie peu des pensées que l'agent ait eu avoir lorsqu'il a donné son ordre.

Le Tribunal ne devrait accorder son consentement en vertu de l'article 31 que dans des circonstances exceptionnelles. Dans la présente affaire, le Tribunal n'est pas prêt à donner son consentement, car la Commission veut forcer l'agent de révision à donner un témoignage qui confirme son allégation selon laquelle l'agent n'était pas impartial. Le fait que l'agent ait pu ne pas être impartial n'a rien à voir avec l'audition, par le Tribunal, de la présente affaire. De plus, une nouvelle audience rectifie tout ce qui précède. Si on admet que le Tribunal est correctement saisi de la prétendue infraction au paragraphe 9 (2) de la *Loi*, il incombe à la Commission de prouver que les raisons qui l'ont poussé à agir sont différentes de celles énumérées au paragraphe 9 (2). La meilleure preuve qu'elle puisse fournir est le témoignage des personnes qui peuvent véritablement expliquer pourquoi les conditions de la pause-repas ont été modifiées, à savoir les personnes qui ont pris cette décision. Le témoignage de l'agent de révision n'a rien à voir avec cette question.

## DECISION OF THE TRIBUNAL, OCTOBER 19, 1990

### *I. INTRODUCTION*

1. The applicant in Tribunal File No. 0106-90, the New Liskeard Police Association ("the Association"), requested a hearing before the Tribunal for the purpose of obtaining compliance by the respondent, the New Liskeard Board of Police Commissioners ("the Board of Commissioners" or "the Board"), with an order issued by a Review Officer dated June 5, 1990 ("the June 5th order"). The June 5th order arose out of the Association's complaint to the Pay Equity Commission that the Board of Commissioners had breached subsection 9(2) of the *Pay Equity Act, 1987*, S.O. 1987, c. 34 ("the Act"), when it required Carole Brown, the police force's civilian clerk, to remain on the premises during her lunch break. Mrs. Brown had previously been able to take her lunch anywhere she wished. The order was actually made under subsections 24(2) and (3) of the Act, the Review Officer being of the view that he did not have jurisdiction to make an order under subsection 9(2) of the Act.

2. The Board of Commissioners subsequently filed with the Tribunal the application in Tribunal File No. 0114-90, requesting a hearing before the Tribunal and asking that the June 5th order be set aside on the grounds that it did not breach the Act as the order states and that the Officer was biased in making the order. It maintains that it changed the practice in order to conform to the collective agreement. The Board also asked that an earlier order dated January 5, 1990 ("the January 5th order") be set aside but subsequently withdrew that request.

3. The January 5th order resulted from an application by the Association to the Pay Equity Commission for assistance in resolving the difficulties it and the Board of Commissioners were having in developing a pay equity plan. The Review Officer assigned to the case found that the civilian clerical staff position (a female dominated job) and the dispatcher position (a male dominated job) were comparable, ordered the parties to continue negotiations, recognizing that comparison, and concluded that "[a] pay equity plan reflecting the terms of this order is to be posted without delay".

4. At the outset of the hearing into these matters, the Board of Commissioners withdrew those portions of its application objecting to the January 5th order. Thus the January 5th order as such is not in dispute, except to the extent referred to below in the context of the identity of "the employer". In fact, a pay equity plan has been posted and the adjustments paid as required by the January 5th order. There are no complaints about the process of negotiating pay equity or the contents of the plan before us. Events coterminous with the posting of the plan, however, led to the subsequent complaint by the Association to the Pay Equity Commission which in turn led to the same Officer's appointment and his June 5th order.

5. This decision deals with three preliminary matters which were addressed at the outset of the hearing before us. The first concerns the identity of "the employer" responsible for implementing pay equity and potentially liable for breaching the Act; the second involves the Board of Commissioner's request that we prohibit the parties from taking their dispute to arbitration; and the third issue is the Board's request for the Tribunal's consent to require the Review Officer to testify in these proceedings. We deal first with the issue of the identity of "the employer".

## *II. PRELIMINARY MATTERS*

### *1. The Identity of "the Employer"*

6. The panel raised this issue with the parties on its own initiative because two entities were identified as "the employer" in the January 5th order, giving rise to a possibility that the Association had named the wrong entity as respondent in its application to the Tribunal.

7. The January 5th order recorded the agreement of "the parties" that "the Town of New Liskeard was the Employer and that the establishment consisted of all employees of the Town of New Liskeard.'" The Town of New Liskeard ("the Town") was not present at

the meeting with the Review Officer. The Officer then reached certain conclusions about the application of the Act on the basis that the Town was "the employer":

> These [the members of the Association's bargaining unit] are the only employees of the municipality who are represented by a bargaining agent. Therefore only two plans are required, one for the Police Association bargaining unit and one for all other employees.
> . . .

> It should be noted that if the dispatcher position is not the right comparator then the same committee [the joint pay equity committee comprised of representatives of the Board of Commissioners and of the Association] would have to look beyond the Commission and study several possible comparators among the unrepresented town employees.

8. In all other ways, however, it appears that the Board of Commissioners was considered to be "the employer". The January 5th order indicates that the Board and the Association had agreed to a particular comparison system for evaluating jobs and the committee negotiating pay equity was composed of representatives of only the Association and the Board of Commissioners. As a practical matter, there is no dispute that all negotiations, meetings with the Officer, and communications involved the Board of Commissioners, not the Town. Furthermore, the styles of cause of both the January 5th and June 5th orders cite as the parties the Association and the Board of Commissioners which is referred to as "the 'Employer'". It appears that the second complaint filed with the Pay Equity Commission by the Association cites the Board as the respondent employer and alleges that the Board contravened subsection 9(2) of the Act. The subsequent request for a hearing to the Tribunal also cites the Board as the respondent employer (as "Board of Commissioners of Police for the Town of New Liskeard").

9. We asked the parties for clarification. (The Town had not been given notice of the application before the Tribunal, there being no request for a remedy against it, and was not present at the hearing.) The parties agreed that a discrepancy existed and made no substantive attempt to justify that the Town is the employer. The Association's representative explained that the agreement had occurred in response to the decision in *Haldimand-Norfolk (No. 3)* (1990) 1 P.E.R. 17, although why that should be so in this particular case was not explained. What does seem clear is that once a comparator had been found for the clerical position within the establishment of the Board of Commissioners, no one much cared any longer about identifying the Town as the employer. It is hard to avoid the conclusion that while for all practical purposes, the Board of Commissioners was considered to be and was treated as the employer, the Town was kept in the wings as the employer of convenience.

10. We do not have to decide who the appropriate employer is. The parties agreed before us that the employer is the New Liskeard Board of Police Commissioners and there is nothing on the face of the materials before us to suggest that that is not the case. They agreed further to our varying the January 5th order to reflect that the Board of Commissioners is the employer. Accordingly, the order of the Review Officer in this matter (Review Services File Number 89.0134) dated January 5, 1990 is varied to remove the first paragraph under **"THE ISSUES"** and all other references arising from and dependent on the agreement that the Town was the employer and that the establishment consisted of all employees of the Town.

11. We next explain why we refused the employer's request to prohibit the parties from going to arbitration to settle their dispute.

### *2. Whether the Tribunal has the Authority to Prohibit the Parties from Proceeding to Arbitration*

12. The Pre-Hearing Conference Memorandum of Agreement in these matters indicates that "[t]here is a . . . preliminary issue raised by the employer of deferral to arbitration". At the hearing, however, counsel for the Board of Commissioners clarified that although that is how the issue had been discussed at the Pre-Hearing Conference, the Board was really asking the Tribunal to rule that the matter could not

proceed to arbitration if one or the other party did not like the result at the Tribunal. In effect, the Board was requesting an order prohibiting the parties from exercising their collective agreement right to have a dispute between them resolved through arbitration.

13. This issue arises because the Board maintains that it required Mrs. Brown to remain "on-site" during her lunch because that is consistent with the collective agreement which provides that she is to work hours eight consecutive hours a day. The Board further maintains that therefore she must remain on-site in order to work the same number of hours as worked by the male job class with which the clerk job class was compared for the pay equity plan. The Association argues that it is consistent with the collective agreement that she have lunch off-site.

14. There are occasions on which the subject matter of a complaint brought under a statute to be dealt with by an administrative tribunal has the character of a dispute falling squarely within the terms of the collective agreement between the parties. In such cases, the tribunal may defer the matter to arbitration, remaining seized to enable it to deal with any issues outstanding after the arbitration has been decided. The tribunal is simply deferring to a more appropriate forum in those cases and to do so is within the tribunal's jurisdiction. That is not the case here. We do not have jurisdiction to prohibit parties before us from exercising rights which may accrue to them from other sources. We advised the parties at the hearing that we declined to issue the order requested by the Board.

15. The last issue is whether the Tribunal should grant its consent to permit the Board to require the Review Officer who issued the January 5th and June 5th orders to testify in these proceedings. We reserved our decision on that matter. We have concluded that this is not an appropriate case in which to grant consent. Our reasons follow below.

### *3. Whether the Tribunal should Give its Consent to Require the Review Officer to Testify*

16. The Board of Commissioners wishes to call the Review Officer because of certain comments it alleges he made to the Board during the meeting with him regarding the first application by the Association (specifically, that the Board should ensure that the clerk worked forty hours a week) and to establish that he had knowledge of the hours worked by the clerk dispatcher when he made his January 5th order requiring the comparison between that position and that of civilian dispatcher. The Officer's testimony, in the Board's view, would assist it in showing that its reason for changing the clerk's hours was not to penalise the clerk (as the Association apparently alleged in its complaint to the Pay Equity Commission) and in establishing that the Officer was biased in making the June 5th order.

17. The Board may call the Review Officer as a witness but cannot compel him to attend and give testimony unless it has obtained the Tribunal's consent, as provided by section 31 of the Act.

> **31.** Except with the consent of the Hearings Tribunal, no member of the Hearings Tribunal, employee of the Commission or person whose services have been contracted for by the Commission shall be required to testify in any civil proceeding, in any proceeding before the Hearings Tribunal or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

18. The Board has accordingly requested that we give our consent. That request entails our considering the meaning and effect of section 31, the process to be followed in requests made under the section, the

interests to be considered under the section and whether we should exercise our discretion to give consent in this case.

*a. The Meaning and Effect of Section 31*

19. Section 31 provides a qualified privilege to certain persons with respect to their compellability as witnesses; it is silent with respect to their competence as witnesses.

20. "Competency" in the context of giving evidence means that an individual is "qualified" to give evidence: in short, that person has something to say about the dispute at hand and is capable of saying it. Not all competent witnesses are called to give evidence; the important point is that a competent witness *may* be called. A person who is not competent to give evidence, however, may not do so even if he or she wishes to do so and even if the evidence were "relevant" to the dispute.

21. The concept of "compellability" addresses the question of the competent witness who does not wish to testify. Such a witness may be forced to do so as long as he or she has been properly served with a duly issued summons to witness and has been paid conduct money; failure to obey a summons may result in contempt proceedings which in turn may result in a jail term.

22. Generally speaking, individuals are both competent and compellable. There are exceptions; however, they have been increasingly circumscribed on the theory that anyone who has information which may assist the inquiry should provide it. Section 111(6) of the *Labour Relations Act*, R.S.O. 1980, c. 228, is an example of a statutory provision which imposes a dual restriction. It states that a member of the Labour Relations Board or a Labour Relations Officer is neither competent nor compellable for certain purposes. There is no provision for the Labour Relations Board to consent in such cases: thus the persons specified cannot testify even if they want to do so and no one can force them to testify. There is no equivalent section in the *Pay Equity Act*.

23. Section 31, by contrast, addresses only compellability. Review Officers and the other persons who fall within its wording are competent witnesses, but it establishes a privilege against their compellability to testify about the information they acquire through the exercise of their duties. There is not an absolute privilege, however, since the Tribunal may give its consent to such a person's being forced to testify. A similar provision is found in section 109 of the *Labour Relations Act*. Counsel for the Board of Commissioners acknowledged that the granting of consent would likely occur only in "extraordinary" circumstances, but he submitted that the circumstances of this case are "extraordinary".

*b. The Process to be Followed in Section 31 Requests*

24. The parties agreed at the Pre-Hearing Conference that "the compellability of the review officer Boris Mather" would be raised at the hearing and counsel for the Board wrote to the Registrar of the Tribunal on September 12, 1990, requesting "the consent of the hearings tribunal that Boris Mather be required to testify at the hearing scheduled for September 17, 1990 in North Bay". Counsel explained that the request was being made

> in anticipation of the hearing so as to give Mr. Mather the opportunity to be present at the hearing without the necessity of serving him with a Summons to Witness and in order to have all potential witnesses present with the effect of expediting the hearing.

25. Neither the Review Officer nor the Pay Equity Office was copied with the letter or given notice in any other fashion. Counsel for the Board explained that by writing to the "Registrar of the Commission", he thought that the Officer would be advised of his request. In fact, he wrote to the Registrar of the Pay Equity Hearings Tribunal. There is not a registrar of the Commission as a whole. The Tribunal and the Pay Equity Office (which appoints Review Officers) are independent of each other. Notice to one does not constitute notice to the other. Although a communication sent to the Tribunal but obviously intended for the Pay Equity Office would likely be forwarded to the Office, in this case counsel obviously intended to write to the Tribunal. Thus neither the particular Review Officer nor a representative of the Pay Equity Office was present at the hearing.

26. One of the questions arising out of the Board's request is that of the relationship of the summons to witness to section 31. Normally, a party wishing to ensure that a witness attends to testify must serve that person with a summons. The Tribunal's authority to compel testimony derives from section 12 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484 ("the S.P.P.A."), which states that "[a] tribunal may require any person, including a party, by summons, (a) to give evidence on oath or affirmation at a hearing. . . ." and which sets out the form a summons is to take and the manner in which it is to be served. While the Tribunal has a general power to control its own procedures, found under paragraph 29(1)(b) of the Act, it is given no specific power in the legislation to summon and enforce the attendance of witnesses and to compel them to give evidence or produce documents. In this respect, the *Pay Equity Act, 1987* can be compared to *The Labour Relations Act* which does grant the Labour Relations Board those specific powers in paragraph 103(2)(a). (On the Tribunal's power to order pre-hearing production, see *Children's Aid Society of the City of Kingston, and the County of Frontenac* (3 August 1990) 0087-90, 0094-90 (P.E.H.T.).)[now reported as Kingston and Frontenac Children's Aid Society (1990), 2 P.E.R. 31]

27. Thus in the normal course, a party wishing to enforce the attendance and/or testimony of a witness must ask the Tribunal to issue a summons, pursuant to section 12 of the S.P.P.A. If that witness refuses to attend or to testify, he or she will be required to do so if he or she has been properly summoned and cannot satisfy the Tribunal of a satisfactory reason for the refusal. In essence, the witness must attend the hearing and explain why he or she should not have to attend as a witness to testify. If the Tribunal is satisfied that a witness has been properly served with a summons in Form 1 under the S.P.P.A., has been paid conduct money, and does not have a lawful excuse not to testify, the Tribunal may enforce the summons by stating a case to the Divisional Court under section 13 of the S.P.P.A. or by the Tribunal's or a party's applying to the court for a bench warrant under section 12 of that Act.

28. The inclusion of section 31 suggests that the persons listed in it stand in somewhat different stead than the "ordinary" witness. Does that affect when a summons should be issued? One approach is the following: if the Review Officer (in this case) had been summoned prior to the request for consent, and had refused to testify, the Board of Commissioners could have sought the consent of the Tribunal under section 31 to enforce the summons. The apparent advantage is that the Officer or his representative would be on notice about the issue and could have attended the hearing for the purpose of arguing that the Officer should not testify. But that would be effectively the same as would occur with respect to an ordinary witness; the requirement of consent and the question of enforcing the summons would be confused, particularly when the proceedings are before the Tribunal. (The two inquiries are obviously separate when the proceedings

involved are not before the Tribunal, since the Tribunal would grant consent and the other forum would enforce the summons, were the appropriate conditions satisfied.)

29. But while the Officer *could* have attended the hearing, should he have had to do so? Normally, the summons grounds the basis of the compellability of the witness. Once summoned, the witness (at least in practical terms) must attend, even if it is to argue about the summons, or run the risk of having enforcement proceedings begun against him or her. Yet the Officer is not compellable until the Tribunal says he is. Thus the procedure followed by counsel in this case is probably more consistent with the real significance of section 31 which changes the status of the Review Officer from that of the "ordinary" witness to one with qualified privilege. On this two-step approach, the witness does not have to attend the hearing and the party calling the witness does not have to pay conduct money until the Tribunal gives consent. Furthermore, the party seeking consent must satisfy the Tribunal that it should give it. The difference between granting consent as a precondition to enforcing compellability and actually enforcing the summons or compellability is maintained. Those advantages are equally applicable to proceedings before the Tribunal and before other tribunals and the courts.

30. Once the Tribunal has given consent, however, the normal practice comes into effect. Had we given consent, counsel would have had to follow the usual procedure of summoning the Officer had he wished to be in a position to compel the Officer's attendance and testimony. Once the Review Officer had been summoned, he could have objected to giving evidence. While that might (but not necessarily) involve the Tribunal in a reconsideration of its decision to grant consent, it would not unnecessarily expand this hearing nor would it involve any prejudice against the Officer. In any event, had the Tribunal given consent, the Officer would have had the same rights and obligations as any other witness: the right to object to being called on the ground that his evidence is not relevant, and an obligation to attend and give testimony if directed to do so by the Tribunal.

*c. Interests underlying Section 31*

31. Section 31 highlights the emphasis placed on confidentiality in the work of the Pay Equity Commission. For Review Officers, the significance of confidentiality arises most often in their investigative and settlement functions. Matters may arrive at the Commission in three ways: notice under section 14 that the employer and the bargaining agent have failed to agree on a pay equity plan; an objection under section 15 from an employee about a plan posted in a workplace in which there is no bargaining agent; and as a complaint under section 22. In the first two cases, subsection 16(1) of the Act requires that "a review officer shall investigate the matter and endeavour to effect a settlement". With respect to complaints, subsection 23(1) of the Act requires that "a review officer shall investigate the complaint and may endeavour to effect a settlement". The Review Officers represent the "front-line" mechanism by which the Commission attempts to control caseload and enhance the ability of the parties to reach their own agreements without further and possibly more directional involvement by the Pay Equity Office or the Hearings Tribunal. The effectiveness of the investigative and settlement processes are integral to the successful functioning of the Pay Equity Commission and the legislation.

32. Parties may compromise and take certain positions in the interests of settlement that they would not be willing to take in a hearing. The parties must feel that they can discuss matters openly and frankly with the Review Officer. They must feel confident that the discussions they may have separately with the Review Officer, which might involve disclosures and explanations, will not come back to haunt them. Similarly, an Officer may be selective in what she transmits to a party or in how she transmits it in attempting to settle a

case. Too close a scrutiny of the process and too much concern by the parties that their comments will be revealed are likely to impair both the investigative and settlement processes. In that regard, it is necessary to take into account the difficulty in limiting the scope of any testimony. Once an Officer testifies for the ostensible purpose of, for example, saying whether he made a specific comment, it would be likely that the context of that comment, countervailing comments and similar associated evidence would also be elicited in chief or cross-examination. In other words, tempting as it may be to believe that any intrusion into the confidentiality of the settlement process could be kept within strict confines, the requirements of fairness and practical reality should make one wary of accepting such an assumption without careful examination of all the circumstances. These interests lead to the conclusion that consent under section 31 should not be readily granted

33. Under the *Pay Equity Act*, however, the Review Officers do not only investigate and endeavour to effect settlements, they also have the authority to make orders. Under subsection 16(2), "[i]f the review officer is unable to effect a settlement as provided for in subsection (1), he or she shall, by order, decide all outstanding matters". In relation to complaints filed under section 22 of the Act, section 24 specifies other orders which may be made by the Review Officers, relating to the preparation and implementation of pay equity plans. By virtue of subsection 23(3), the Review Officers also may decide that a complaint should not be considered if it is "trivial, frivolous, vexatious or made in bad faith" or is "not within the jurisdiction of the Commission".

34. Does the authority of a Review Officer to make orders under these circumstances affect the rationale for not readily granting consent under section 31? It may be argued, for example, that an Officer's power to make an order if she is unable to effect a settlement, is in itself an impediment to the willingness of the parties to talk openly to an Officer who is trying to settle the case. We see no reason to impair the efficacy of the settlement process any further than may already occur as a result of the dual role conferred on the Review Officers by the legislation; the Officer's power to make an order does not undermine the need to enhance the settlement process.

35. Not all requests to call the Officer will arise in relation to information provided during an investigation or comments made during settlement efforts. Sometimes, the request may be more directly related to the attack on the order. For example, in this case, there is an allegation that the Officer was biased in making the June 5th order and the Board of Commissioners wishes to establish that he had been given certain information relating to this allegation.

36. Under paragraph 25(2)(e), the Tribunal has the power to "confirm, vary or revoke orders of review officers". The Act is silent about the nature of the hearing before the Tribunal when a party requests a hearing and is silent about the status of an Officer's order before the Tribunal. The Tribunal has said that it holds a *de novo* hearing, rather than an appeal, an approach which we adopt. In *Cybermedix Health Services Ltd.* (1990) 1 P.E.R. 41, the Tribunal explained why it approaches a request for a hearing in this way:

> 17. . . . The primary focus of Review Services is to mediate with the parties and to attempt to settle the issues in dispute. This focus is essential in an effective dispute resolution process. The receipt and the evaluation of evidence is not their focus. Although review officers are required to be fair, the more formal requirements of the *Statutory Powers Procedures Act* R.S.O. 1980, c. 484 do not apply *Pay Equity Act, 1987*, s. 34(4).[sic] In contrast, section 25 of the *Pay Equity Act, 1987* requires the Tribunal to hold a hearing and to comply with the provisions of the *Statutory Powers Procedure Act*. This proceeding is not an appeal from a review officer's order, but is rather, a hearing *de novo* on the issues in

> dispute. For example, the only information the Tribunal had about this case from the Pay Equity Office is the order of the review officer. Evidence on issues in dispute must be called at the hearing by the parties and be subject to cross-examination. The Tribunal will assess the credibility of witnesses and determine the weight to be given to the evidence. To turn these proceedings into an appeal of a review officer's order would be contrary to the intent of the statute, would have the negative impact of judicializing the review services process and would take away their primary focus on mediation and settlement. Therefore, these proceedings will be hearings not appeals, and the decisions of the Tribunal will be made based on the evidence presented at the hearing.

(Also see *Haldimand-Norfolk (No. 2)* (1990) 1 P.E.R. 13, at paragraph 3, on this point.)

37. The Tribunal does not ask: given what the Officer had in front of her or him or given what he or she believed, is what he or she decided correct or reasonable? It does not ask: was the Officer biased and if he or she was, did that affect the order? Rather, the Tribunal asks: given what we have heard and read in the materials given to us in evidence by the parties, what should we conclude in this case? Does that differ in any way from what the order says and should we confirm, vary or revoke the order? Thus the Tribunal has little interest that the Officer had certain thoughts in mind when he or she made the order. The basis of the Officer's order is in the normal course irrelevant to the Tribunal's decision. Furthermore, any breach of natural justice or fairness manifested by, for example, bias, which might have occurred, is cured by the opportunity to have a new hearing in front of the Tribunal. It is not our task to hear complaints about a failure by Review Officers to follow natural justice or principles of fairness. The answer might be different if we were sitting in appeal of an Officer's order and were concerned whether it was correct or reasonable, but we are not.

*d. Should the Tribunal Grant Consent in this Case?*

38. In order to decide whether to grant consent in this case, we need to understand exactly what is before us. The parties have been arguing this case on the basis that an allegation under subsection 9(2) is before us. That provision makes it a breach of the Act for specified entities, including "an employer", to "intimidate, coerce or penalize, or discriminate against, a person" *because* the person has or is engaged (or may engage) in certain specified activities relating to pay equity (for example, because the person is participating in a proceeding under the Act or because the person is exercising any right under the Act).

39. From the June 5th order it is clear that the original application by the Association to the Pay Equity Commission claimed a contravention of subsection 9(2) of the Act. The Officer expressed his "opinion" that the allegation was supported by the circumstances of the case, but did not make an order under subsection 9(2) because, in his view, "[a] Review Officer does not have the specific power to order a remedy for infractions of Section 9(2)". Accordingly, he founded his order on subsections 24(2) and 24(3) of the Act.

40. There may be some question as to whether it was appropriate for the Officer to dispose of the application under subsection 9(2) in the manner he did. By that approach, however, it appears to us that he may have effectively removed the subsection 9(2) allegation from the stage. Regardless of the Officer's expression of opinion about whether the Board contravened subsection 9(2), there exists in fact no ruling or order that the Board of Commissioners did contravene subsection 9(2). There is an order based on findings that the Board required Mrs. Brown to remain at her desk during her lunchtime: in the words of the order, that means that the pay equity plan which was posted by the Board "is not being implemented according to

its terms" and that pay equity is not being maintained in contravention of subsection 7(1) of the Act because Mrs. Brown "now has to work more hours to earn the same adjusted rate".

41. We disagree with counsel for the Board that the inclusion of the Officer's opinion with respect to subsection 9(2) has the same effect as an order under that section or that the order under the other provisions is the same as an order under subsection 9(2). The ingredients of a violations leading to orders under subsections 24(2) and 24(3) seem to be different from the ingredients of a violation of subsection 9(2). An allegation of a violation of subsection 9(2), on the plain meaning of the wording of the subsection, seems to require the party making the allegation to show that the reason for the conduct leading to the allegation was "because" of one of the reasons listed in the subsection; although the onus lies on the applicant, the respondent would likely want to show that it had another reason for its conduct. Subsections 24(2) and 24(3), on the other hand, require simply a comparison between the terms of the pay equity plan and the manner in which it is being implemented and between the compensation practices which constitute pay equity with the compensation practices which are said not to constitute pay equity, respectively.

42. We return then to the application of section 31. The interests underlying section 31, as well as the wording of section 31 itself, warrant a restrictive interpretation of the circumstances under which the Tribunal should grant consent. As counsel for the Board of Commissioners said, consent should be granted only in "extraordinary" circumstances. We are cognizant that in this case, the Board maintains that it requires the Officer's testimony to explain why it insisted Mrs. Brown to remain on-site during her lunch hour, as well as to establish the Officer's alleged bias. We have been required to consider whether the testimony is salient to the Board's capacity to respond fully to the allegations against it or to justify fully a revocation of an Officer's order. Those factors must be weighed against the interests underlying section 31.

43. File No. 0106-90 involves only the narrow question of whether the Board of Commissioners has done what it was told to do in the June 5th order. That does not involve any consideration of why it did not do so, if it did not. In File No. 0114-90, the Board of Commissioners disputes the June 5th order on its merits and seeks to have it set aside. To the extent that the Board wishes to call the Officer to elicit testimony that supports its allegation that the Officer was biased, we are not prepared to give consent. Even if the Officer were biased, as we have explained, it is irrelevant to our consideration of the case and if it occurred, it is cured by our new hearing.

44. The Officer's alleged comment is irrelevant to any analysis of whether pay equity is being maintained or implemented according to its terms: either it is or it is not. Assuming that there is an allegation of a subsection 9(2) violation before us, to the extent that the Board has an onus to show us that it acted for reasons other than one enumerated in subsection 9(2) or alleged by the applicant, its best evidence (in that it goes directly to the issue in dispute) is that provided by the decision-makers: they, not the Officer, made the decision; only they *could* make the decision; and only they can explain why they took the action they did. At this point, it does not appear that the Officer's testimony is necessary for the Board to establish that, as it has stated, it made the changes to conform to the collective agreement and that such reason does not fall within subsection 9(2).

45. It appears to us that, at bottom, the Board wants to call the Officer because it finds his alleged conduct galling: it contends that he told the Board to "do X" and then when the Board did "X", he found that it had contravened the Act. Be that as it may, that reason (even if it were reflective of the actual events) does not warrant our overriding the strong reasons against giving our consent under section 31.

46. For the above reasons, we are not prepared to grant consent to require the Officer to testify.

### *III. SUBSECTION 9(2)*

47. We have commented that there may not in fact be an allegation under subsection 9(2) of the Act before us, for the reasons set out above. In light of the way in which the parties have argued this case to date, we invite them to make submissions on this point.

48. We also invite the parties' submissions on the question of whether a case can be successfully made that there has been a violation of subsection 9(2) if there has not been established a specific link between (in this case) the employer's conduct and action engaged in by the "person" who has allegedly been penalized (that is, Carole Brown). In short, is it sufficient that a penalty which is vaguely connected with the pay equity process has been imposed in order for there to be a violation of subsection 9(2)?

49. The parties may address these two issues at the next day of hearing.

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**0131-90 IN THE MATTER** of a Referral under subsection 24(5) of the *Pay Equity Act, 1987* relating to the Senior Officers' Association of the Timmins Police Force and the Board of Commissioners of Police of the City of Timmins

**Before:** Vice Chair, Ralph Palumbo and Members, Bruce Budd and Janet Slone Taylor

**Cite As: Re Timmins Board of Commissioners of Police (No.1) (1990), 2 P.E.R. 50**

**Practice and Procedure – Referrals**

A Review Officer formed the opinion that neither of the parties had complied with his order and referred the matter to the Tribunal. Neither party made an application to the Tribunal.

The Tribunal requested the parties to make submissions as to how it ought to proceed.

The matter raises questions of substance and procedure which ought to be dealt with before the commencement of the hearing, specifically: (1) are the parties, or either of them, alleging that the order has not been complied with, and if so, is that party prepared to make an application to the Tribunal; (2) are the Tribunal's Rules of Practice dealing with non-compliance applications applicable, and if so, who is the Applicant and who is the Respondent; and (3) is the matter properly before the Tribunal given that that Review Officer appears to have been appointed under s. 16(1) of the Act, but made the referral under s. 24(5). The Pay Equity Office may file submissions regarding the third question.

**Pratique et procédure – Renvois**

L'agent de révision était d'avis que les parties n'avaient pas respecté son ordre et il a renvoyé la question au Tribunal. Aucune partie n'a présenté de requête au Tribunal.

Le Tribunal a demandé aux parties de lui présenter des observations sur la marche à suivre.

Cette affaire soulève des questions de fond et de procédure qu'il importe de régler avant le début de l'audience, à savoir : (1) est-ce que les parties, ou que l'une d'entre elles, prétendent que l'ordre n'a pas été respecté et, dans ce cas, est-ce que cette partie est prête à présenter une requête au Tribunal; (2) est-ce que les règles de pratique du Tribunal concernant les requêtes relatives au défaut de respecter un ordre s'appliquent dans la présente affaire, et, dans ce cas, qui est l'auteur de la requête et qui est l'intimé; (3) est-il approprié que le Tribunal soit saisi de cette question étant donné qu'il semble que l'agent de révision a été nommé en vertu du paragraphe 16(1) de la *Loi* mais qu'il a renvoyé la question au Tribunal en vertu du paragraphe 24(5). Le Bureau de l'équité salariale peut présenter des observations en ce qui concerne la troisième question.

## DECISION OF THE TRIBUNAL, NOVEMBER 5, 1990

1. This matter comes before the Tribunal by way of a Referral by the Review Officer pursuant to subsection 24(5) of the *Pay Equity Act, 1987*, S.O. 1987 c.34 (the "Act") alleging that the Board of Commissioners of Police of the City of Timmins (the "Board") and The Senior Officers' Association of the Timmins Police Force (the "Association") have not complied with his Order dated July 23, 1990.

2. The Review Officer's Order of July 23, 1990 states:

> "I was appointed Review Officer in this matter on April 10, 1990 pursuant to an application for Review Services submitted by the Association dated February 23, 1990. The parties were negotiating a pay equity plan with a mandatory posting date and, if required, a first adjustment date of January 1, 1990. In order to investigate the matter and attempt to effect a settlement, I met with the parties on May 24, 1990....
>
> As the parties have not sought male comparators from within their own bargaining unit and only evaluated one male job class in the establishment, it is obvious that they have not complied with Section 6 of the *Act*. Therefore I will be issuing an order in accordance with Section 24(1) of the *Pay Equity Act, 1987*....
>
> THE ORDER
>
> I hereby order the Board of Commissioners of Police for the City of Timmins and the Senior Officers' Association to compare the female job classes in the Association's bargaining unit with male job classes in the establishment in a manner consistent with the requirements of Section 6 of the *Pay Equity Act, 1987*. The parties shall advise me of their findings in this regard on or before September 17, 1990....
>
> Further to my appointment under Section 16(1) of the *Act*, I will monitor the parties' continued progress..."

3. Subsequent to issuing the Order of July 23, 1990 the Review Officer formed the opinion that the parties had not complied with it. On October 16, 1990 the Officer therefore referred the matter to the Tribunal pursuant to subsection 24(5) of the *Act*.

4. We note that neither party has made an application to the Tribunal alleging that the Order has not been complied with. The Referral to the Tribunal dated October 16, 1990 does not outline how the Order has not been complied with nor does it explain which party has failed to comply with it. The Review Officer filed another Referral dated October 24, 1990 in which he states that in his opinion "neither party is complying with any portion of this order..."

5. This matter raises some interesting and difficult questions of both procedure and substance which ought to be dealt with prior to the commencement of a hearing. For this reason we request written submissions from the parties on the following issues:

1. Are the parties, or either of them, alleging that the Review Officer's Order of July 23, 1990 has not been complied with? If so, is that party prepared to make an Application to the Tribunal?
2. Non-compliance Applications are dealt with under Rules 1.04 and 1.05 of the Tribunal's Rules of Practice. It is unclear whether they apply in the circumstances of this case. The Tribunal is requesting submissions respecting whether the Rules of Practice, and in particular Rules 1.04 and 1.05, do apply in the circumstances of this case? If so, which party in this case is the Applicant and which is the Respondent?
3. Is the matter properly before the Tribunal as it appears that the Review Officer was appointed pursuant to subsection 16(1) of the *Act* whereas the Referral was made under subsection 24(5) of the *Act*?

6. We direct the Registrar to serve notice of this Decision on the Pay Equity Office ("the Office"). Should the Office wish to file written submissions concerning the issue outlined in Question 3 above they may do so.

7. The Tribunal directs that written submissions be served on the parties and the Office and filed with the Tribunal within 14 days of the date of this Decision. The parties and the Office will then have a further seven days to serve any replies to the original submissions and to file them with the Tribunal.

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**0122-90** Corporation of the City of Gloucester, Applicant v. Canadian Union of Public Employees, Local 1525, Respondent

**Before:** Beth Symes, Chair, and Members Geri Sheedy and Janet Slone Taylor

**Appearances:** Frances Crowhurst and Jock Jardine for the Applicant, Corporation of the City of Gloucester Nancy Rosenberg and Joanne Harvey for the Respondent, Canadian Union of Public Employees, Local 1525

**Cite As: Gloucester (No. 1) (1991), 2 P.E.R. 52**

### Application of Act - Bargaining Agent

The Applicant embarked on a job evaluation project through which it hoped to achieve both pay equity and internal equity. The Respondent, Canadian Union of Public Employees, Local 1525 ("Local 1525") was invited to participate, and it did so, from time to time seeking the advice of the staff representative from the office of the national union, the Respondent, Canadian Union of Public Employees ("CUPE"). After the project had been underway for some time, CUPE wrote to the Applicant indicating its desire to begin pay equity negotiations. The Applicant objected and maintained that Local 1525 was the bargaining agent responsible for pay equity and that CUPE was bound by the agreements negotiated between the Applicant and Local 1525. The issues before the Tribunal were: is CUPE the bargaining agent?; and if so, is it bound by the agreements between the Applicant and Local 1525?

The Tribunal held that CUPE is the bargaining agent, but that it was bound by the agreements already negotiated between the Applicant and Local 1525.

CUPE is the certified bargaining agent for the employees of the Applicant. Its bargaining rights have been neither abandoned nor terminated, nor has Local 1525 ever made an application to be declared a successor trade union. The Applicant must negotiate pay equity with CUPE. CUPE is, however, bound by the agreements already reached between the Applicant and Local 1525. Based on the evidence, the Tribunal concludes that CUPE acts through its local, and that unless and until CUPE intervenes, it is bound by the actions of its local. The Tribunal rejects the suggestion that because Local 1525's President did not follow normal CUPE practices for negotiating and ratifying collective agreements, CUPE is not bound by any of the pay equity negotiations. The Tribunal will not embark on an enquiry into the internal affairs of the union. The Applicant had no reason to question the authority of the representatives of Local 1525 to negotiate pay equity. Had it done so, it might well have been seen to have interfered with the union in contravention of the *Labour Relations Act*. If there were deficiencies in the administration of Local 1525, there may be remedies elsewhere.

### Pay Equity Process - Negotiation - Good Faith - Choice of Representative

The Applicant embarked on a job evaluation project through which it hoped to achieve both pay equity and internal equity. The Respondent, Canadian Union of Public Employees, Local 1525 ("Local 1525") was invited to participate, and it did so, from time to time seeking the advice of the staff representative from the office of the national union, the Respondent, Canadian Union of Public Employees ("CUPE"). After the project had been underway for some time, Local 1525 requested that the CUPE staff representative be permitted to attend meetings. The Applicant refused.

The Tribunal expressed its concern regarding the Applicant's refusal but made no finding that it violated the *Act*.

The Applicant was wrong to have denied access. A union is entitled to choose its own representatives in dealing with the employer. The employer has the same right. Representatives need not be employees or members of the local. However, if CUPE wished to assert this right, it should have done so earlier. As CUPE took no steps to establish this right until two years into the process, the Tribunal makes no finding with respect to this issue.

### Pay Equity Process - Negotiation - Good Faith - Disclosure

The Applicant embarked on a job evaluation project through which it hoped to achieve both pay equity and internal equity. The Respondent, Canadian Union of Public Employees, Local 1525 ("Local 1525") was invited to participate, and it did so, from time to time seeking the advice of the staff representative from the office of the national union, the Respondent, Canadian Union of Public Employees ("CUPE"). After the project had been underway for some time, CUPE wrote to the Applicant indicating its desire to bargain over pay equity and requested disclosure of information concerning the comparison system and the results of the evaluation.

The Tribunal ordered the Applicant to release the information.

The bargaining agent is responsible for negotiating a pay equity plan for members of the bargaining unit. In order to foster rational and informed discussions and to enable the parties to move towards settlement, information relevant to pay equity must

be disclosed. CUPE is entitled to sufficient information to intelligently appraise the Applicant's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members. Disclosure must be made at all states of negotiating pay equity so that informed choices can be made. the Tribunal is satisfied that disclosure of the information requested is necessary so that the bargaining agent is able to test the system for accuracy, consistency, fairness and gender bias. It is not rational to require CUPE to accept or reject the Applicant's proposals without this information. CUPE has given an explicit undertaking that it will use the information to negotiate a pay equity plan and not for any improper purpose.

## Champ d'application de la Loi – Agent négociateur

L'auteur de la requête a mis sur pied un programme d'évaluation des emplois qui lui permettrait, c'est ce qu'il espérait, d'atteindre à la fois l'objectif d'équité salariale et d'équité interne. La partie intimée, la section locale 1525 («section locale 1525») du Syndicat canadien de la fonction publique, a été invitée à y participer. La section locale 1525 a effectivement participé au programme et obtenu, à l'occasion, les conseils du représentant du personnel du bureau national, à savoir le Syndicat canadien de la fonction publique(«le Syndicat») qui constitue l'intimé. Quelque temps après le début du fonctionnement du programme, le Syndicat a communiqué à l'auteur de la requête son désir d'entreprendre des négociations dans le domaine de l'équité salariale. L'auteur de la requête s'y est opposé en faisant valoir que la section locale locale 1525 constituait l'agent négociateur responsable de la question de l'équité salariale et que le Syndicat était lié par les ententes conclues entre l'auteur de la requête et la section locale 1525. Les questions dont était saisi le tribunal étaient les suivantes : Est-ce que le Syndicat constitue l'agent négociateur? Si oui, est-il lié par les ententes conclues entre l'auteur de la requête et la section locale 1525?

Le Tribunal a statué que le Syndicat était l'agent négociateur, mais qu'il était lié par les ententes qui avaient déjà été conclues entre l'auteur de la requête et la section locale 1525.

Le Syndicat est l'agent négociateur accrédité des employés de l'auteur de la requête. Il n'a jamais renoncé à ses droits en matière de négociation collective ni ne les a annulés. De plus, la section locale 1525 n'a jamais présenté de requête pour être reconnue comme syndicat-successeur. L'auteur de la requête doit traiter des questions d'équité salariale avec le Syndicat. Toutefois, celui-ci est lié par les ententes déjà conclues entre l'auteur de la requête et la section locale 1525. Compte tenu des preuves déposées devant lui, le Tribunal conclut que le Syndicat agit par l'intermédiaire de la section locale et qu'il est lié par les mesures que prend celle-ci jusqu'à ce qu'il intervienne lui-même. Le Tribunal rejette la proposition selon laquelle le Syndicat n'est pas lié par les négociations entreprises dans le domaine de l'équité salariale parce que le président de la section locale 1525 n'a pas respecté les règles habituelles du Syndicat en ce qui concerne la négociation et la ratification des conventions collectives. Le Tribunal ne procédera pas à une enquête sur le fonctionnement interne du syndicat. L'auteur de la requête n'avait aucune raison de mettre en doute le pouvoir des représentants de la section locale 1525 d'entreprendre des négociations dans le domaine de l'équité salariale. S'il avait eu des doutes, on aurait pu l'accuser d'ingérence dans les affaires du syndicat contrairement à la *Loi sur les relations de travail*. Si l'administration de la section locale 1525 comporte des faiblesses, des recours peuvent exister ailleurs.

## Processus d'équité salariale – Négociation – Bonne foi – Choix des représentants

L'auteur de la requête a mis sur pied un programme d'évaluation des emplois qui lui permettrait, c'est ce qu'il espérait, d'atteindre à la fois l'objectif d'équité salariale et d'équité interne. La partie intimée, la section locale 1525 («section locale 1525») du Syndicat canadien de la fonction publique, a été invité à y participer. La section locale 1525 a effectivement participé au programme et obtenu, à l'occasion, les conseils du représentant du personnel du bureau national, à savoir le Syndicat canadien de la fonction publique, qui constitue l'intimé. Quelque temps après le début du fonctionnement du programme, la section locale 1525 a demandé que le représentant du personnel puisse assister aux réunions. L'auteur de la requête a refusé.

Le Tribunal s'est inquiété du refus de l'auteur de la requête, mais il n'a pas conclu que celui-ci avait enfreint la *Loi*.

L'auteur de la requête a eu tort d'interdire au représentant d'assister aux réunions. Un syndicat a le droit de choisir les personnes qui le représentent auprès de l'employeur. De plus, l'employeur possède le même droit. Il n'est pas nécessaire que les représentants soient des employés ou des membres de la section locale. Toutefois, si le Syndicat avait voulu faire valoir ce droit, il aurait dû le faire plus tôt. Étant donné que le Syndicat a attendu deux ans pour faire valoir ce droit, le Tribunal n'arrive à aucune conclusion en ce qui concerne cette question.

## Processus d'équité salariale – Négociation – Bonne foi – Divulgation

L'auteur de la requête a mis sur pied un programme d'évaluation des emplois qui lui permettrait, c'est ce qu'il espérait, d'atteindre à la fois l'objectif d'équité salariale et d'équité interne. La partie intimée, la section locale 1525 («section locale 1525») du Syndicat canadien de la fonction publique, a été invité à y participer. Elle a effectivement participé au programme et obtenu, à l'occasion, les conseils du représentant du personnel du bureau national, à savoir le Syndicat canadien de la fonction publique qui constitue l'intimé. Quelque temps après le début du fonctionnement du programme, le Syndicat a écrit à l'auteur de la requête pour lui faire part de son désir d'entreprendre des négociations dans le domaine de l'équité salariale. Il a demandé que des renseignements concernant le système de comparaison et les résultats de l'évaluation lui soient divulgués.

Le Tribunal a ordonné à l'auteur de la requête de divulguer les renseignements demandés.

L'agent négociateur est chargé de négocier un programme d'équité salariale à l'intention des membres de l'unité de négociation. Afin de favoriser des discussions rationnelles et éclairées et de permettre aux parties d'en arriver à un règlement, il importe que les renseignements concernant l'équité salariale soient divulgués. Le Syndicat a le droit de recevoir suffisamment de renseignements pour évaluer, de façon intelligente, les propositions de l'auteur de la requête, élaborer sa propre position en ce qui concerne la négociation des questions d'équité salariale et représenter honnêtement ses membres. Il faut que des renseignements soient divulgués à toutes les étapes des négociations de l'équité salariale afin que les parties puissent faire des choix éclairés. Le Tribunal est convaincu qu'il est nécessaire de donner suite à la demande de divulgation de renseignements afin que l'agent négociateur puisse examiner l'exactitude, l'uniformité et le caractère équitable et non sexiste du système. Il n'est pas rationnel de demander au Syndicat d'accepter ou de rejeter les propositions de l'auteur de la requête sans ces renseignements. Le Syndicat s'est formellement engagé à n'utiliser les renseignements qui lui seront divulgués qu'aux fins exclusives de négocier un programme d'équité salariale.

## DECISION OF THE TRIBUNAL, FEBRUARY 18, 1991

1. The Corporation of the City of Gloucester (the City) requested a hearing with respect to an order of the Review Officer dated June 29, 1990. That order determined that the Canadian Union of Public Employees (CUPE) was the bargaining agent for the members of Local 1525 (the Local) in pay equity matters and ordered the City and CUPE to resume negotiations immediately to complete and post a pay equity plan. The officer further ordered the City to release to CUPE information concerning the evaluation of the CUPE jobs.

2. The City objects to this order and states that the Local is the bargaining agent responsible for negotiating pay equity and that the City has negotiated with this bargaining agent, has agreed on the job comparison system to be used, and has used that system to evaluate the CUPE positions.

3. CUPE asserts that it is the bargaining agent for the employees at the City, and that CUPE is not bound by any pay equity agreements negotiated by the Local with the City.

4. Second, the City also objects to providing some of the information which the Review Officer ordered be disclosed. CUPE states that this information is necessary so that the bargaining agent will be able to assess the pay equity plan proposed by the City.

5. Therefore, the issues in dispute include:

   1. Who is the bargaining agent responsible for negotiating pay equity?
   2. Who may bargain pay equity for the bargaining agent?
   3. What information must be disclosed by the City to the bargaining agent?

### Pay Equity Negotiations

6. The City and the bargaining agent are responsible for negotiating in good faith and endeavouring to agree on the gender neutral comparison system and the pay equity plan for the bargaining unit.[1] The pay equity plan, which should have been bargained and posted by January 1, 1990, has not been completed.[2]

7. To meet its pay equity obligations, the City chose to embark on a job evaluation project which would compare the jobs of all employees of the City. The City hoped to achieve "full internal equity". The City wanted to establish a joint committee of representatives of employees and representatives of the City to be responsible for the project. In November 1987, Jock Jardine, the Commissioner of Human Resources for the City, invited George Vadeboncoeur, the president of Local 1525, to participate on the Steering Committee of the job evaluation project. Mr. Jardine stated that he invited George Vadeboncoeur to participate on behalf of CUPE. Mr. Vadeboncoeur accepted the invitation and other members of Local 1525 participated in the project. Mr. Jardine also invited the president of the Association of Municipal Employees, an employee organization, to participate on behalf of its members and the president of the Association of Public Works Employees, another employee association, to participate on behalf of its members. The other employees not represented as above, elected a person to serve on the Steering Committee.

8. During the life of this project at the City, there were a number of changes in personnel for the City, for the Local, and for CUPE. The City had three successive chief administrative officers; the Local had four successive presidents: George Vadeboncoeur, Chuck Hamilton, Bernie Marrast and Catherine

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1 *Pay Equity Act,1987*, S.O. 1987, as amended, c.34, s.14(2)
2 *Pay Equity Act*, supra, s.10(a)

Ferguson. There were also two CUPE staff representatives: Bob Rouleau and Joanne Harvey. The problems which have arisen may be due, in part, to those changes.

9. The Steering Committee was chaired by the chief administrative officer of the City and had equal representation of City department heads and City employees, including the president of Local 1525. The Steering Committee was responsible for all key decisions in the project and met for the first time on December 9, 1987. The Steering Committee established three subcommittees: the Consultant Selection Committee, the Task Force, and the Appeals Committee.

10. The Consultant Selection Committee had six members, including the president of Local 1525 and another member of Local 1525. This committee was responsible for recommending a consultant to the Steering Committee. The Task Force had eight members, three persons from management and five non management employees; two of the employees were chosen by the Local. The Task Force was responsible for determining the job content of all positions at the City and for evaluating those positions. The Appeals Committee had seven members, including a member of Local 1525, and was to be responsible for hearing all appeals with respect to the evaluation of positions and will be responsible for maintaining the system. Detailed minutes of the Steering Committee meetings were kept and distributed to the members of that Committee.

11. The first task of the Steering Committee was to draft the request for proposals to hire the consultant for the project. The committee discussed the list of potential consultants and George Vadeboncoeur advised the committee that he would be seeking CUPE input with respect to possible consultants, including their advice on the tentative list. The minutes record that the president promised to obtain this advice by February 19, 1988.

12. After this meeting, George Vadeboncoeur resigned his position with the City and his presidency of Local 1525. Chuck Hamilton was elected to replace him as president. Mr. Hamilton also replaced Mr. Vadeboncoeur on the Steering Committee and on the Consultant Selection Committee. The first Steering Committee meeting he attended, on February 19, 1988 dealt with the issue of request for proposals from consultants. The Steering Committee agreed on the list of consultants who were to receive the request for proposals and agreed that the Consultant Selection Committee would short-list the finalists.

13. The Consultant Selection Committee met in March and April 1988 to review the proposals received. Two firms, Coopers & Lybrand and Peat, Marwick were interviewed. Chuck Hamilton and Joyce Shortell, a member of Local 1525, participated in the selection process. Four of the five committee members present picked Coopers & Lybrand as their first choice (including Ms. Shortell). Chuck Hamilton picked Peat, Marwick as his first choice but agreed that he would go along with the majority of the committee.

14. The CUPE staff representative, Bob Rouleau knew that the City had embarked on a job evaluation project and that George Vadeboncoeur was a part of that process. When Mr. Vadeboncoeur resigned, Mr. Jardine wrote to Mr. Rouleau on February 9, 1988 and proposed that an issue be delayed until the Local had chosen a new president. Mr. Jardine wrote "I am sure you would agree our Job Evaluation initiatives are going to require much concentrated effort by both parties in the months to come".

15. Bob Rouleau testified that in March or April 1988, he received a call from Chuck Hamilton asking whether to use Coopers & Lybrand or Peat, Marwick as the consultant. Mr. Rouleau set up a meeting with Jo Ann Collett from the job evaluation department of CUPE's national office. They met to discuss the issue. At that meeting, Bob Rouleau indicated some concern as to how the Local had got to the stage of

choosing a consultant. Mr. Hamilton explained what had taken place, the structure of the job evaluation project, the subcommittees and the Local's participation. Bob Rouleau expressed real concerns about one individual speaking on behalf of the membership. He tried to find out if Mr. Hamilton had been elected to do this. Mr. Hamilton's answer was unclear. He stated that he was the president and was speaking on behalf of the membership. Jo Ann Collett then gave her advice that if the choice was between Coopers & Lybrand and Peat, Marwick, then CUPE preferred Peat, Marwick with which it had worked. CUPE had had no experience working with Coopers & Lybrand. Mr. Hamilton told Mr. Rouleau and Ms. Collett that the committee had already chosen Coopers & Lybrand and that he was the only one favouring Peat, Marwick. Ms. Collett testified that she had given her advice to Mr. Hamilton but that she did not know if he followed it. Therefore, by April 1988 CUPE knew that the City had embarked on a job evaluation process, that the president of Local 1525 and other members of the Local were involved in the various committees, and that they were making a final selection of the job comparison system to be used in evaluating all the jobs at the City.

16. After the April 1988 meeting, Chuck Hamilton resigned his position with the City and his presidency of the Local. A meeting of the Consultant Selection Committee was convened on June 9, 1988. Invited to that meeting were Joyce Shortell, a member of the Local, Chuck Hamilton (no longer an employee of the City), Cynthia Lodge, the acting president of the Local, and the three candidates for the position of president of the Local:
B. Marrast, C. Shaw, and D. Page. The Committee discussed the selection of a job comparison system. It was agreed that the three candidates for president of the Local would have one vote. The majority of the Committee voted to select Coopers & Lybrand. The three candidates voted to select Peat, Marwick. The candidates agreed that the majority vote would rule and that Coopers & Lybrand would be selected as consultant.

17. Bernie Marrast was elected as president to replace Chuck Hamilton as president. Mr. Marrast sought information and advice from Jo Ann Collett about job evaluation and advised her that two members of Local 1525 were assigned to the Task Force to evaluate all the jobs.

18. The Steering Committee agreed with the selection of Coopers & Lybrand as the consultant and the City wanted to enter into a contract with them and to begin evaluating jobs. Wendy Van Lunen, the project director, wrote a detailed memorandum to Bernie Marrast, President of Local 1525 on June 23, 1988 setting out the sequence of events surrounding the selection of the job consultant. Ms. Van Lunen wrote:

> It is important to us that we continue an open, co-operative approach with our employee groups and that you, as the new CUPE President, are in agreement with our approach. We will shortly be entering into the contract with Coopers & Lybrand and I would appreciate it if you would advise us before we go any further as to whether or not we have misunderstood CUPE's agreement to the selection of this firm

Bernie Marrast replied on July 6, 1988:

> Agreed with the selection of consultant.

Based on that agreement, the City entered into a contract with Coopers & Lybrand and began the task of training the members of the Task Force to evaluate the positions.

19. In the summer of 1988, Jo Ann Collett met with Bernie Marrast, the executive of the Local and Bob Rouleau, the staff representative, to discuss the terms of reference for the project and to plan for a training session for those persons in the Local involved in job evaluation. On August 29, 1988 Bernie Marrast wrote Jock Jardine and asked for a leave of absence with pay for the six members of the Local executive to attend a two day training seminar on job evaluation and pay equity offered by Jo Ann Collett. In this memo, Mr. Marrast identified Suzanne Bray and Karen Martin as the "CUPE Task Force". On September 1, 1988 Mr. Jardine agreed to a leave of absence with pay for three persons to attend this CUPE seminar and suggested that Bernie Marrast, Suzanne Bray and Karen Martin should attend as all three would be actively involved with the job evaluation project. The seminar was held in September 1988.

20. Jo Ann Collett attended one or two information sessions on pay equity offered by the City during the week of September 8, 1988. She also attended the orientation session for the Steering Committee on September 16, 1988.

21. On September 12, 1988, Bernie Marrast and Jo Ann Collett met with David O'Brien, the chief administrative officer of the City, Jock Jardine, Wendy Van Lunen, and Charles Taconne, the consultant from Coopers & Lybrand to discuss CUPE's concerns about the job questionnaire and the job evaluation process. Mr. Marrast asked if Jo Ann Collett could sit in on Steering Committee meetings. A heated exchange followed in which David O'Brien said that he was concerned about the timing of Collett's involvement and that he did not want CUPE national to stall the process. Ms. Collett said that Bernie Marrast was nervous about getting her involved. Collett's attendance was raised at the next meeting of the Steering Committee on September 26, 1988. Mr. Marrast asked that Jo Ann Collett be included at Steering Committee and Task Force meetings. The three other employees on the Steering Committee were opposed to her attendance. The job evaluation process was seen as an "in-house" exercise and the Committee was reluctant to introduce an outside party. Bernie Marrast agreed with this decision. Following this meeting, Ms. Collett met with Bob Rouleau, the staff representative, to express her concerns.

22. In October 1988, members of the Task Force were seconded on a full-time basis for five months to evaluate all the positions at the City using the Coopers & Lybrand job comparison system. Two members of Local 1525, Karen Martin and Maureen Johnson, participated fully in this process. City employees were informed about the project and its progress through information bulletins prepared by Wendy Van Lunen. The Task Force reported to the Steering Committee at its monthly meetings.

23. Throughout the fall of 1988 and in 1989, Bernie Marrast sought the advice of Jo Ann Collett about issues facing the various committees. Ms. Collett testified that there were lots of meetings, usually with the president, either to review the agenda prior to an upcoming Steering Committee meeting or to discuss unresolved issues carried over from the last meeting. Ms. Collett knew that the project was using Coopers & Lybrand as the job comparison system to evaluate the jobs.

24. During the negotiations for the 1989-90 collective agreement, CUPE tabled a request for a bilingual bonus. Wendy Van Lunen was invited to the bargaining session and explained that jobs that were bilingual were being given a half degree credit for skill in the job evaluation process. Based on that information, CUPE withdrew this demand. Mr. Rouleau testified that at the ratification meeting on March 31, 1989 he believed that the job evaluation process was pretty close to being finished.

25. When Joanne Harvey became the staff representative for Local 1525 in February 1989, Bob Rouleau told her that there was a job evaluation process that the committee was working on. Shortly after that, Ms. Harvey met with Jo Ann Collett who expressed her concerns. Ms. Harvey understood that Bernie

Marrast was at meetings and that he would contact her if there were problems. She knew that a committee was evaluating the jobs, that there were members of Local 1525 on the committees. She assumed that everything was going as planned. From time to time, Mr. Marrast did contact Ms. Harvey to ask for advice. Ms. Harvey testified that she gave the advice but that Mr. Marrast did not follow it.

26. Joanne Harvey testified that on November 28, 1999 Bernie Marrast came to her distraught and frustrated about working on the committee. Ms. Harvey said that she began reacting at that point. Her first step was to write to the City on January 25, 1990 as the bargaining agent for the employees and to request information in order to negotiate a pay equity plan. This letter is the first notice to bargain pay equity sent by CUPE to the City. After this letter was sent, Mr. Marrast resigned from his position with the City and from the presidency of Local 1525.

27. The parties met on February 23, 1990 to discuss the issues. The City gave Ms. Harvey the information she had requested. On March 14, 1990 Ms. Harvey advised the City that it was CUPE's position that the Coopers & Lybrand system did not meet the requirements of the *Pay Equity Act*.

28. The City was "disappointed and dismayed" by this letter. Mr. Jardine wrote the new president of Local 1525, Catherine Ferguson, and said that the City had negotiated in good faith with the local representatives of CUPE and that this eleventh hour intrusion of the national office was unwarranted and negated all of the good work that had been accomplished over the last two years. CUPE applied to Review Services April 11, 1990 with respect to the outstanding issues.

**Who is the bargaining agent?**

29. The City maintains that the bargaining agent for the employees at the City is Local 1525 and not the national union, CUPE. The City claims that Local 1525 is a trade union, separate and autonomous from CUPE and that the national union, CUPE, merely acts as an advisor to the Local. The City relies on the wording in the collective agreement and the fact that from 1980 to 1986 the Local served notice to bargain and that no representative of CUPE attended at collective bargaining. Successive collective agreements have been signed by members of the Local; no representatives of CUPE have signed any collective agreements. In addition, the Local has settled grievances under the collective agreement with no involvement of a CUPE representative. It is the City's position that it has negotiated pay equity with the bargaining agent for the employees at the City, namely Local 1525.

30. CUPE asserts that it is the bargaining agent for the employees at the City and that Local 1525, which is a charter member of CUPE, does not have the independent status of bargaining agent for the employees in dispute. It is CUPE's position that the City has not yet begun negotiating pay equity with the bargaining agent.

31. The Pay Equity Act[3] requires the employer and the bargaining agent for the bargaining unit to negotiate in good faith and endeavour to agree on:

(a) the gender neutral comparison system; and

(b) a pay equity plan for the bargaining unit.

The Act[4] also requires the employer and the bargaining agent to maintain pay equity.

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3 *Pay Equity Act*, supra, s. 14(2)

4 *Pay Equity Act*, supra, s. 7(2)

32. The Tribunal must determine whether the bargaining agent responsible for negotiating pay equity for the employees in question is CUPE or the Local and whether there are any binding pay equity agreements.

33. "Bargaining agent" is defined in the Pay Equity Act[5] :

> "bargaining agent" means a trade union as defined in the *Labour Relations Act* that has the status of exclusive bargaining agent under that Act in respect of any bargaining unit or units in an establishment ....

34. The Labour Relations Act[6] defines trade union as:

> "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

35. A trade union governed by the provisions of the *Labour Relations Act* can obtain bargaining agent status in two ways by:

1. being certified by the Labour Relations Board as the bargaining agent for employees in a bargaining unit appropriate for collective bargaining; or
2. being voluntarily recognized in a collective agreement by the employer as the bargaining agent for certain employees as specified in the agreement.

36. On December 11, 1972, the Ontario Labour Relations Board certified CUPE as the bargaining agent for all office and clerical employees of the City, except for management persons and persons employed in a confidential capacity.

37. After certification, these employees applied to CUPE for a charter to form a Local under the constitution of CUPE and on January 3, 1973 they were granted status as Local 1525 of CUPE. The Local must abide by the constitution and bylaws of CUPE.

38. In 1973 the City and CUPE successfully negotiated a first collective agreement. The cover page of that agreement said that the collective agreement was between the City and "CUPE and its Local 1525, hereinafter called the Union". The parties negotiated a recognition clause in which the City recognized "CUPE and its Local 1525" as the "sole and exclusive bargaining agency" for all full-time office and clerical employees of the City, except for management persons and persons employed in a confidential capacity.

39. Thereafter, the parties negotiated successive collective agreements. The current collective agreement, dated April 10, 1989, is between the City and Local 1525 of CUPE, "hereinafter called the Union" and provides that the City recognizes "CUPE and its Local 1525" as the "sole and exclusive collective bargaining unit" for all full-time office and clerical employees of the City, except for management persons and persons employed in a confidential capacity.

40. The Tribunal agrees with counsel for the City that there may be cases in which a local union is a separate entity from its national organization[7] . But, in this case the Tribunal finds that Local 1525 is part of the national union, CUPE, and is bound by the provisions of the constitution and its bylaws. And whereas

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5 *Pay Equity Act*, supra, s. 1(1)

6 *Labour Relations Act*, R.S.O. 1980, c.228 as amended, ss. 1(1)(p)

7 *Pigott Construction Company Limited* (1965), 65 C.L.L.C. 16,053 (O.L.R.B.)
*Gilbarco Canada Ltd.*, [1971] O.L.R.B. Rep. Mar. 155
*American-Standard Products (Canada) Limited*, [1965] O.L.R.B. Rep. Jan. 590

CUPE has obtained status as a trade union from the Ontario Labour Relations Board, Local 1525 has not done so.

41. The Tribunal finds that CUPE obtained its bargaining agent status for the employees of the City from the Ontario Labour Relations Board when it was certified in 1972 and has never abandoned those bargaining rights.[8] In fact, a staff representative of CUPE has been actively involved in negotiating the last two collective agreements and staff representatives have prepared, filed and dealt with grievances under the collective agreement. In January 1989, CUPE protected its bargaining rights for these employees by filing an intervention at the Ontario Labour Relations Board when the Teamsters union applied to be the bargaining agent of certain employees at the City.

42. The bargaining agent retains its bargaining rights for the employees in question unless and until the Ontario Labour Relations Board certifies another trade union to represent the employees, or, issues a declaration that the bargaining rights have been terminated, abandoned, or that another trade union has succeeded to the bargaining rights of the first trade union. Before a finding is made, there must be clear evidence that a trade union has abandoned its bargaining rights.[9]

43. In this case, the Ontario Labour Relations Board has not certified the Local to represent the employees. There has been no declaration that CUPE's bargaining rights for these employees have been terminated. Local 1525 has not made an application to be the successor trade union.[10] And there is no evidence that CUPE has abandoned its bargaining rights for the employees at the City.

44. The Tribunal rejects the City's submission that successive collective agreements have changed the identity of the bargaining agent. Whereas parties may agree to change the scope of the bargaining unit in a collective agreement, under the *Labour Relations Act* they cannot agree to change the identity of the bargaining agent.[11] If the parties wish to change the identity of the bargaining agent, they must go back to the Labour Relations Board.

45. Therefore, the Tribunal concludes that CUPE is the bargaining agent of the employees in the bargaining unit and the City must negotiate pay equity with CUPE.

**Who may bargain pay equity for CUPE?**

46. The City asserts that CUPE is bound by the agreement of the President of Local 1525 to use Coopers & Lybrand as the job comparison system and other agreements regarding the pay equity plan for the bargaining unit.

47. CUPE states that it is not bound by these agreements because the Presidents of Local 1525 did not have a mandate from the membership to negotiate pay equity. Second, the pay equity agreements they and other CUPE members reached with the City were not ratified by the membership.

48. In order to determine this issue, the Tribunal heard evidence about the structure of CUPE and the relationship of CUPE to its locals.

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8 *Guelph Cartage Co.* (1955), 55 C.L.L.C. 18,018
*J. S. Mechanical*, [1979] O.L.R.B. Rep. Feb. 110 at p. 111

9 *Labour Relations Act*, supra, sections 56, 57, 59(1), 60(1), and 62
*American-Standard*, supra, at p.594

10 *Labour Relations Act*, supra, s.62

11 *Gilbarco Canada Ltd.*, supra

49. CUPE is a national organization with an elected national executive and a national office in Ottawa. The National Office provides legal and job evaluation services. CUPE issues charters to locals who are groups of employees which have organized for the purposes of collective bargaining. The locals are bound by the constitution and bylaws of CUPE. On the one hand, the constitution provides that locals are autonomous[12] and that the National Executive Board may intervene in the running of a local only if it has reason to believe that the local may be dominated, controlled or substantially influenced, in the conduct of its affairs by any corrupt influence, or that its policies or activities are contrary to the principles or policies of CUPE[13] . In such circumstances, the National Executive Board has the authority to impose an administrator on the local and that administrator is then responsible for running the affairs of the local[14] . On the other hand, the constitution states that no one has the power to act as agent for CUPE or to bind CUPE except as authorized by the National President or the National Executive Board[15] . These provisions are difficult to reconcile and therefore the Tribunal has relied upon evidence of the working relationship between CUPE and its locals.

50. CUPE employs 220 staff representatives who are responsible for assisting locals in collective bargaining and in processing grievances. The regional director of each province is responsible for these staff representatives and assigns a staff representative to service a group of locals. The Tribunal heard evidence from two staff representatives, Bob Rouleau who serviced Local 1525 from 1986 to February 1989, and Joanne Harvey who serviced Local 1525 from February 1989 to September 1990. Based on their evidence and the documents filed, it is clear that CUPE locals vary as to the amount of assistance each requires or seeks from the staff representative. Some locals are self sufficient. In practice, this means that the local negotiates collective agreements, processes grievances, and otherwise administers the collective agreement with little or no assistance from the staff representative. Other locals require a lot of advice and servicing. For those locals, the staff representative assists in formulating bargaining demands, negotiates the collective agreement, drafts grievances, processes grievances, and generally assists the local in all aspects of administering the collective agreement. The level of servicing may depend upon the experience of the local, its relationship with the employer, and the nature of the issue in dispute.

51. To negotiate a collective agreement with the employer, the membership of the local elects a bargaining committee. The local then decides whether to seek the advice and services of their staff representative during negotiations. Harvey and Rouleau testified that as staff representatives, they are involved in collective bargaining for all their locals. The function of the staff representative is to sit on the negotiating committee and to provide advice and bargaining expertise to the local. The staff representative does not vote and the negotiating committee is free to ignore the advice and wishes of the staff representative. It is CUPE's practice that memoranda of agreement negotiated with the employer are taken back to the membership of the local to be ratified and the new collective agreement is then signed by the negotiating committee on behalf of CUPE.

52. Bob Rouleau testified that if a local ignores the advice of the staff representative, that representative could advise his or her regional director. In appropriate circumstances, the regional director would speak with the local to try to persuade them to reverse their decision. If the director's advice were ignored, the

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12 Constitiution of Canadian Union of Public Employees, article 7.9

13 Constitution of CUPE, article 7.7

14 Constitution CUPE, articles 7.7 and 7.8

15 Constitution CUPE, article 5.2; Appendix "B" article B.4.6

director would have the option of asking the National Executive Board to place the local under administration. Mr. Rouleau, who has been a CUPE staff representative for the past eleven years, could give only one example of a local being placed under administration. Both the constitution and the evidence are clear that locals are placed under administration only in extraordinary circumstances.

53. Joanne Harvey and Bob Rouleau both testified that they are involved in negotiating pay equity on the same basis as they negotiate collective agreements for locals. In addition, the staff representatives and the locals may seek the advice and assistance of the job evaluation department of CUPE's National Office in Ottawa.

54. CUPE's constitution provides that the membership shall elect the president and other officers of the local .[16] The president has the authority to appoint all committees and to transact business necessary for the proper functioning of the local.[17] The local advises the employer of the results of their elections. These provisions govern the operation of Local 1525.

55. Based on this evidence, the Tribunal concludes that the bargaining agent, CUPE, acts through its Local. Decisions on collective bargaining, processing grievances, and administering the collective agreement are made by the Local. Local 1525 may choose to consult with the CUPE staff representatives, but may choose not to follow the advice. Unless and until CUPE intervenes in the operation of Local 1525, CUPE is bound by the actions of the Local.

56. The Tribunal must now turn to CUPE's assertion that the process for negotiating pay equity used by the President and Local 1525 was flawed as it did not follow the normal CUPE practices for negotiating and ratifying collective agreements. Because of these alleged deficiencies, CUPE claims that it is not bound by any of the pay equity agreements.

57. CUPE's claim would require an enquiry into internal union affairs. The Tribunal refuses to embark on such an enquiry. The City had no reason to question the authority of the President or the members of the Local in the pay equity negotiations. Moreover, such enquiries into internal union affairs by an employer might well be seen as interference with the administration of the trade union, contrary to section 64 of the *Labour Relations Act*. If there were deficiencies in the administration of the Local, there may be remedies elsewhere, for example, in CUPE's constitution. The Tribunal is not prepared to adjudicate on internal union affairs.

58. The Tribunal concludes that the bargaining agent, CUPE, is bound by the pay equity agreements reached between Local 1525 and the City.

**Choice of Representative**

59. The Tribunal is concerned that the City refused to allow Jo Ann Collett to attend meetings of the Steering Committee and the Task Force in September 1988. The union had the right to have Jo Ann Collett present for meetings of the Steering Committee and the Task Force to advise the members of the Local on job evaluation. The City was wrong to have denied her access.

60. A union is entitled to choose its own representatives in dealing with the employer. CUPE has the right to choose its representative to bargain pay equity. The City has the same right. The employer had no right to select CUPE's representative. The selection of persons to represent the union must be free from interference by the employer. Both parties must be able to draw on the expertise available to them for pay

16 CUPE Constitution, Appendix "B" B.II

17 CUPE Constitution, Appendix "B" B.3.1

equity bargaining. The representatives of the parties need not be employees of the City nor members of the Local.[18]

61. If CUPE wished to assert this right, it should have done so earlier by filing a complaint of bargaining in bad faith or by grieving under the collective agreement. The Tribunal makes no finding with respect to this issue however, as CUPE took no steps to establish that right until January 25, 1990, two years into the process.

**What information must the City disclose?**

62. The Review Officer ordered the City to disclose to CUPE information concerning the comparison system and the results of the evaluation of the CUPE jobs. The City has provided most of the information ordered but refuses to release the point values for each degree level of the factors and subfactors used and the total point score for the CUPE positions. The City submits that the Steering Committee decided that this information would not be released to the employees because the release of this information to employees may distort the appeals process. The City asserts that CUPE is bound by that decision. The City is concerned that the release of this information to the bargaining agent would be the release of the information to the employees.

63. The bargaining agent, CUPE, is responsible for negotiating a pay equity plan for the members of the bargaining unit. In order to foster rational and informed discussions and to enable the parties to move towards settlement the City must disclose to the bargaining agent information relevant to pay equity. CUPE is entitled to sufficient information to intelligently appraise the City's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members. Neither party should negotiate "in the dark". Disclosure must be made at all stages of negotiating pay equity so that informed choices can be made.[19]

64. Jo Ann Collett, a member of the job evaluation department of CUPE, testified that she needs the information requested in order to evaluate and assess the pay equity plan proposed by the City. Without this information, Collett cannot or would not be able to advise CUPE whether to accept, to reject, or to seek modifications to the proposed plan.

65. Charles Taccone, a manager in compensation and the architect of the computer software for the Coopers & Lybrand system, was assigned to the Gloucester project. He testified that normally full and complete disclosure is made to all the parties responsible for negotiating pay equity so that they are able to make informed decisions. It is Coopers & Lybrand practice to recommend full disclosure in order to satisfy the parties that the evaluation process was consistent and fair, and that the resulting pay equity plan meets the requirements of the Act.

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18 *McDonnell Douglas Canada Limited*, [1988] O.L.R.B. Rep. May 498 at p. 499
*Re Bilt-Rite Upholstering Co.* (1990), 10 L.A.C. (4th) 342

19 *Cybermedix Health Services Ltd.* (1989), 1 P.E.R. 43 at p.45 to 47
*Riverdale Hospital* (16 February 1990) 0016-89 and 0031-89 (P.E.H.T.)
*DeVilbiss (Canada) Limited*, [1976] O.L.R.B. Rep. March 49
*Globe Spring & Cushion Ltd.*, [1982] O.L.R.B. Rep. Sept. 1303
*The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, [1985] O.L.R.B. Rep. May 705
*Forintek Canada Corp.*, [1986] O.L.R.B. Rep. Apr. 453
*Royal Conservatory of Music*, [1985] O.L.R.B. Rep. Nov. 1652

66. The Tribunal is satisfied that the information requested, the distribution of points across the degree levels of each subfactor and the total point score of each CUPE position are both necessary so that the bargaining agent, CUPE, is able to test the system for accuracy, consistency, fairness, and gender bias. CUPE is entitled to this information so that it will be in a position to assess the pay equity plan proposed by the City and then recommend its acceptance, modification, or rejection to the membership. It is not rational to require CUPE to accept or reject the pay equity plan proposed by the City without this information.

67. The Tribunal accepts that it is preferable to have a fair and efficient appeal mechanism which does not distort the job evaluation process. The City is concerned that the disclosure of the total point score to each employee will encourage frivolous appeals. It may be that a person who knows that her job has been evaluated close to the upper end of a band may be encouraged to appeal in the hope of moving her job to the next higher band. On the other hand, a person whose job is rated towards the bottom of a band may be discouraged from appealing. But the appeal process must deal with all the cases. The appeal process itself will decide if the grounds for appeal are frivolous or founded. The Tribunal is not persuaded that the disclosure of this information to CUPE will distort the appeal procedure. The information is to be disclosed to the bargaining agent, CUPE, which has given an explicit undertaking that it will use the information to negotiate a pay equity plan and not for any improper purpose.

**Remedy**

68. The Tribunal confirms the order of the Review Officer dated June 29, 1990 that CUPE is the bargaining agent for the members of Local 1525, in pay equity matters.

69. The Tribunal varies the order of the Review Officer and determines that CUPE is bound by the pay equity agreements reached between Local 1525 and the City.

70. The Tribunal confirms the order of the Review Officer that the City must disclose to the bargaining agent, CUPE, the distribution of point values across the degree levels of the subfactors and the escalation equation for that distribution. The City is also ordered to disclose to CUPE the total point score for each CUPE position. Mr. Taccone has offered to assist CUPE to understand this data by providing information and answering questions. We urge the parties to seize this opportunity to facilitate the completion of the negotiations for a pay equity plan for this bargaining unit.

71. CUPE and the City have an obligation to negotiate in good faith and endeavour to agree upon a pay equity plan for the bargaining unit. The parties have not completed these negotiations. The Tribunal directs the City and CUPE to resume negotiations forthwith. If there are any disputes with respect to these issues, this panel will remain seized.

**0106-90 0114-90** New Liskeard Police Association, Applicant v. New Liskeard Board of Police Commissioners, Respondent; New Liskeard Board of Police Commissioners, Applicant v. New Liskeard Police Association, Respondent

**Before:** Patricia Hughes, Alternate Chair, and Members Janet Slone Taylor and Melda Okoye

**Appearances:** Richard Houston for the New Liskeard Police Association, S.A. Bernofsky for the New Liskeard Board of Commissioners of Police

**Cite As:** New Liskeard Board of Police Commissioners (No.2) (1991), 2 P.E.R. 65

### Review Services - Jurisdiction

The New Liskeard Police Association ("the Association") complained that the Board of Commissioners of Police ("the Board") contravened s. 9(2) of the *Act* by shortening an employee's lunch break and requiring her to remain on the premises during it. The Review Officer found that he did not have jurisdiction to make an order under s. 9(2), but went on to find a violation of subsections 7(1) and 22(2)(a) and made an order under subsections 24(2) and 24(3). In an earlier decision [*New Liskeard Board of Police Commissioners (No.1)* (1990), 2 P.E.R. 39 ], the Tribunal invited the parties to make submissions on the proper procedure to be followed.

The Tribunal held that the Officer did not have jurisdiction to deal with the s. 9(2) complaint.

The Officer was correct in finding that he did not have jurisdiction to make an order remedying a violation of s. 9(2). The *Act* provides that where an Officer cannot settle a s. 9(2) complaint, the matter shifts to the Tribunal. The intent of the legislature should not be thwarted by resort to other sections of the *Act*. Parties wishing to pursue their s. 9(2) allegations in the future must do so by filing an application directly with the Tribunal after the Officer notifies the parties and the Tribunal that the complaint has not been settled.

### Tribunal Member Melda Okoye Dissented:

The procedure adopted by the Review Officer was quite proper and within his jurisdiction. Because not all s. 9 violations will necessarily be s. 7 violations, Officers ought not to automatically deal with s. 9 allegations by making orders under s. 7 of the *Act*. The *Act* should be amended to give Officers the power to deal with violations of s. 9.

### Pay Equity Act - Prohibitions on Intimidation

The New Liskeard Police Association ("the Association") complained that the Board of Commissioners of Police ("the Board") contravened s. 9(2) of the *Act* by shortening an employee's lunch break and requiring her to remain on the premises during it. The Review Officer found that he did not have jurisdiction to make an order under s. 9(2), but went on to find a violation of subsections 7(1) and 22(2)(a) and made an order under subsections 24(2) and 24(3). The Tribunal chose to deal with the merits of the s. 9(2) complaint.

The Tribunal held that the employer had not violated s. 9(2) of the *Act*.

A party making an allegation under s. 9(2) must be prepared to establish: (1) that the person was involved in a protected activity; (2) that the action of the respondent had the kind of effect prohibited by s. 9(2); and (3) that the respondent acted as it did because the person was engaging in the protected activity. Unlike other legislation, the *Act* does not contain a reverse onus provision and it is thus up to the complainant to satisfy the Tribunal on a balance of probabilities that s. 9(2) has been violated. It is not up to the respondent to show that its conduct did not violate the *Act*. In this case, the timing of the change in working conditions was troubling, but the employer has provided an explanation that was not successfully rebutted by other evidence.

### Tribunal Member Melda Okoye Dissented:

Based on the evidence, the employer's explanation that the change was unrelated to pay equity is not credible. It would be beneficial if a reverse onus provision were included in the *Act*.

### Pay Equity Act - Maintaining Pay Equity

The New Liskeard Police Association ("the Association") complained that the Board of Commissioners of Police ("the Board") contravened s. 9(2) of the *Act* by shortening an employee's lunch break and requiring her to remain on the premises during it. The Review Officer found that he did not have jurisdiction to make an order under s. 9(2), but went on to find a violation of subsections 7(1) and 22(2)(a) and made an order under subsections 24(2) and 24(3). The Tribunal chose to deal with the merits of the order.

The Tribunal revoked the Officer's order.

Section 7(1) and 22(2)(a) of the *Act* require the Tribunal to examine the content of the pay equity plan. This plan requires that the Civilian Staff be compared to the Dispatcher position and an adjustment paid for 1989. There is no dispute that it was paid. Those were the terms of the plan and they were implemented. There was no evidence whether the change to the lunch break had any impact on the comparison or somehow made the comparison invalid. There was thus no evidence of a violation of the obligation to establish and maintain compensation practices that provide for pay equity.

### Tribunal Member Melda Okoye Dissented:

In the circumstances the employer's actions contravened s. 7(1) of the *Act*.

### Services de révision - Compétence

L'Association de police de New Liskeard («l'Association») s'est plainte que la Commission de police («la Commission») avait enfreint le paragraphe 9 (2) de la *Loi* lorsqu'elle a raccourci la pause-repas d'une employée et lui a demandé de la prendre sur son lieu de travail. L'agent de révision a conclu qu'il n'avait pas la compétence nécessaire pour donner un ordre relativement à

une infraction au paragraphe 9 (2), mais il a conclu que le paragraphe 7 (1) et l'alinéa 22 (2) a) de la *Loi* avaient été enfreints et il a donné un ordre en vertu des paragraphes 24 (2) et (3). Dans une décision antérieure [*Commission de police de New Liskeard (no 1)* (1990), 2 P.E.R. 39], le Tribunal a invité les parties à lui présenter des observations sur la marche à suivre appropriée.

Le Tribunal a statué que l'agent n'était pas compétent pour traiter de la plainte relative à une infraction au paragraphe 9 (2).

L'agent avait raison lorsqu'il a conclu qu'il n'était pas compétent pour donner un ordre visant à remédier à une infraction au paragraphe 9 (2). La *Loi* prévoit que lorsqu'un agent ne peut pas régler une plainte relative à une infraction au paragraphe 9 (2), la question est renvoyée au Tribunal. Le recours à d'autres articles de la *Loi* ne devrait pas contrarier l'intention du législateur. À l'avenir, les parties qui désirent donner suite à des allégations d'infractions au paragraphe 9 (2) devront présenter une requête directement au Tribunal après que l'agent les a avisées et a avisé le Tribunal que la plainte n'a pas été réglée.

### Dissentiment de Melda Okoye, membre du Tribunal

La démarche qu'a suivie l'agent de révision était tout à fait appropriée et ne débordait pas de son champ de compétence. Étant donné que les infractions à l'article 9 ne seront pas nécessairement toutes des infractions à l'article 7, les agents ne doivent pas traiter ces infractions en donnant automatiquement des ordres visant à éliminer toute infraction à l'article 7 de la *Loi*. Il faudrait modifier la *Loi* en vue de donner aux agents le pouvoir de traiter des infractions à l'article 9.

### Loi sur l'équité salariale – Manoeuvres d'intimidation interdites

L'Association de police de New Liskeard («l'Association») s'est plainte que la Commission de police («la Commission») avait enfreint le paragraphe 9 (2) de la *Loi* lorsqu'elle a raccourci la pause-repas d'une employée et lui a demandé de la prendre sur son lieu de travail. L'agent de révision a conclu qu'il n'avait pas la compétence nécessaire pour donner un ordre relativement à une infraction au paragraphe 9 (2), mais il a conclu que le paragraphe 7 (1) et l'alinéa 22 (2) a) de la *Loi* avaient été enfreints et il a donné un ordre en vertu des paragraphes 24 (2) et (3). Le Tribunal a décidé de traiter du bien-fondé de la plainte relative à l'infraction au paragraphe 9 (2).

Le Tribunal a statué que l'employeur n'avait pas enfreint le paragraphe 9 (2) de la *Loi*.

La partie qui allègue une infraction au paragraphe 9 (2) doit être prête à prouver ce qui suit : 1) la personne participait à une activité protégée; 2) la mesure prise par l'intimé a eu la conséquence qu'interdit le paragraphe 9 (2); et 3) l'intimé a pris cette mesure, car la personne exerçait une activité protégée. Contrairement à d'autres lois, la *Loi* ne comprend pas une disposition relative à l'inversion du fardeau de la preuve. Il incombe donc au plaignant de convaincre le Tribunal, compte tenu de la prépondérance des probabilités, que le paragraphe 9 (2) a été enfreint. L'intimé n'est pas tenu de prouver que les mesures qu'il a prises enfreignent la *Loi*. Dans la présente affaire, la date à laquelle les conditions de travail ont été modifiées est troublante, mais l'employeur a fourni une explication que les autres preuves n'ont pu réfuter.

### Dissentiment de Melda Okoye, membre du Tribunal

Compte tenu des preuves fournies, l'explication de l'employeur selon laquelle les modifications apportées ne sont pas liées au programme d'équité salariale n'est pas crédible. Il serait avantageux que la *Loi* comprenne une disposition relative à l'inversion du fardeau de la preuve.

### Loi sur l'équité salariale – Maintien de l'équité salariale

L'Association de police de New Liskeard («l'Association») s'est plainte que la Commission de police («la Commission») avait enfreint le paragraphe 9 (2) de la *Loi* lorsqu'elle a raccourci la pause-repas d'une employée et lui a demandé de la prendre sur son lieu de travail. L'agent de révision a conclu qu'il n'avait pas la compétence nécessaire pour donner un ordre relativement à une infraction au paragraphe 9 (2), mais il a conclu que le paragraphe 7 (1) et l'alinéa 22 (2) a) avaient été enfreints et a donné un ordre en vertu des paragraphes 24 (2) et (3). Le Tribunal a décidé de traiter du bien-fondé de l'ordre.

Le Tribunal a révoqué l'ordre de l'agent.

Le paragraphe 7 (1) et l'alinéa 22 (2) a) de la *Loi* exigent que le Tribunal examine le contenu du programme d'équité salariale. Ce programme exige que le personnel civil soit comparé aux répartiteurs et qu'un rajustement de la rétribution lui soit versé pour 1989. On ne nie pas que ce rajustement a été versé. Il s'agit en fait d'une condition du programme et elle a été mise en oeuvre. Aucune preuve n'existe prouvant que la modification de la pause-repas a eu une incidence sur la comparaison ou l'a invalidée. Il n'existe donc aucune preuve d'une infraction à l'obligation d'établir et de maintenir des pratiques de rétribution prévoyant l'équité salariale.

### Dissentiment de Melda Okoye, membre du Tribunal

Dans les circonstances, les mesures que l'employeur a prises enfreignent le paragraphe 7 (1) de la *Loi*.

## DECISION OF THE TRIBUNAL, FEBRUARY 27, 1991

## I. INTRODUCTION

1. The New Liskeard Police Association ("the Association") and the New Liskeard Board of Commissioners of Police ("the Board" or the "Board of Commissioners") were to negotiate and post a pay equity plan by January 1, 1990. As a result of an order by a Review Officer dated January 5, 1990 ("the

January 5th order"), a pay equity plan which increased the salary of the civilian clerical staff position, was implemented. At the same time, however, there was a change in the working conditions of the civilian clerk. The Association filed a complaint with the Pay Equity Commission. The Board was ordered by a Review Officer order dated June 5, 1990 ("the June 5th order") to reinstate the previous working conditions and to compensate the clerk. The Board did not do so. The Association has requested that the Tribunal direct the Board to comply with the June 5th order (Tribunal File No. 0106-90). Subsequently, the Board of Commissioners requested that we set aside the June 5th order (Tribunal File No. 0114-90).

2. For reasons explained below, the Review Officer did not make his June 5th order on the basis of finding a violation of subsection 9(2) of the Act, but rather on the basis of finding violations of other sections of the Act. This approach necessitated our considering the effect of the Review Officer's approach on the status of the subsection 9(2) allegation and on the status of the actual order made by him. This decision deals with those issues, as well as the issues raised directly by the parties' applications.

3. At the outset of the hearing, the parties addressed several preliminary matters; our rulings on those matters are found in an earlier decision dated October 19, 1990.

## II. BACKGROUND

4. The January 5th order (which was amended by our October 19th decision) was issued after the parties met with the Review Officer on December 20, 1989, following an application to the Pay Equity Commission by the Association. It directed the parties to continue negotiations, recognizing that the civilian clerical staff position (a female dominated job class) and the dispatcher position (a male dominated job class) constituted an appropriate comparison for the pay equity plan, and to post "without delay" a pay equity plan "reflecting the terms of this order". That order is not in dispute. The only incumbent of the civilian clerical position was and is Carole Brown.

5. The Board of Commissioners met on February 13, 1990 and determined to post the plan as required. In the same motion, however, they reached a decision about Mrs. Brown's hours of work. The motion reads as follows:

> That the order, as issued by The Pay Equity Commission dated Jan. 5, 1990, be received and that a posting be placed indicating that the clerical position will be paid equivalent to the dispatcher position effective Jan. 1, 1990 and that the work hours be as described in Article 9.01 of the work agreement;
>
> Further that Chief Jelly be directed by letter that the individual filling the clerical postion must remain at the usual work location for the work hours as described in the work agreement.

The plan was posted on February 19, 1990 and the adjustment made. Mrs. Brown also received a letter which required her to remain on the premises during her lunch period which was to last for one half hour. (The letter was not put in evidence, but Mrs. Brown's evidence was not disputed.)

6. For fourteen years, Mrs. Brown had worked from 8:30 a.m. to 4:30 p.m., taking a lunch break from noon to 1 p.m. Although she sometimes worked through lunch without claiming overtime, she was free to leave the premises. (In contrast, she claimed overtime when she worked after 4:30 p.m., on the basis of a forty hour week.) Suddenly, she was required to stay on the premises to have her lunch and, apparently, to limit her actual lunch period to a half hour.

7. This change prompted the Association to file another complaint with the Pay Equity Commission, alleging that the Board of Commissioners had violated subsection 9(2) of the Act. The same Review Officer was appointed as had been appointed to the first complaint and he subsequently issued the June 5th order. In the order, he expressed his "opinion" that the allegation was supported by the circumstances of the case, but being of the view that the Act does not give Review Officers "the specific power to order a remedy for infractions of Section 9(2)", he did not in fact make an order that there had been a contravention of subsection 9(2). Instead, the Review Officer ruled that the Board had breached "the duty to maintain the established pay equity" and was not implementing the plan according to its terms; he therefore made orders under subsections 24(2) and (3) of the Act, directing the Board to reinstate Mrs. Brown's hours of work, which he specified as "8:30 a.m. to 4:30 p.m., Monday to Friday, with a one hour paid lunch period [which] need not be taken at the work location", and to compensate Mrs. Brown for extra hours worked.

## III. THE ISSUES

8. As we have indicated, the approach taken by the Review Officer raises certain procedural and substantive questions. Therefore, in addition to the merits of any allegations before us, we consider two other issues:

1. whether the allegation under subsection 9(2) is properly before us ("the status of the subsection 9(2) allegation"); and
2. whether the order founded on other sections of the Act is properly before us ("the status of the June 5th order").

### A. The Status of the Subsection 9(2) Allegation

9. The structure of the Act suggests that the Review Officer was correct in concluding that he could not give a remedy for a contravention of subsection 9(2). Section 22 of the Act provides that an employer, an employee or group of employees, or the bargaining agent may file a complaint with the Pay Equity Commission alleging a contravention of the Act. Under subsection 23(1), "a review officer shall investigate the complaint and may endeavour to effect a settlement". If the Review Officer "decides that a settlement cannot be effected and that he or she will not be making an order under subsection 24(3)", she is required by subsection 23(2) to notify the parties and the Tribunal.

10. Section 24 of the Act sets out orders which a Review Officer may make:

> **24.** (1) [In relation to a failure to prepare a pay equity plan as required by Part II.]
>
> (2) Where a review officer is of the opinion that a pay equity plan is not being implemented according to its terms, the review officer may order the employer to take such steps as are set out in the order to implement the plan.
>
> (3) Where a review officer is of the opinion that there has been a contravention of subsection 7(1) or (2), the review officer may order the employer and the bargaining agent, if any, to take such steps as are set out in the order to comply with either or both of those subsections.
>
> (4) [Provision for a later mandatory posting date.]
>
> (5) [Reference by the Review Officer to the Tribunal for non-compliance with an order under this section.]
>
> (6) [Provision for request for a hearing.]

11. In reference to subsection 24(2), we note paragraph 22(2)(a) of the Act which provides for the filing of complaints by an employee or group of employees or by a bargaining agent that a pay equity plan applying to the employee(s) "is not being implemented according to its terms". Subsection 24(2) refers to section 7 of the Act which requires employers to "establish and maintain compensation practices that provide for pay equity" and prohibits employers and bargaining agents from bargaining for or agreeing to compensation practices that, if adopted, would contravene the duty to establish and maintain pay equity.

12. Nowhere in section 24 is subsection 9(2) alluded to, nor is there a "basket" provision which might ground a power to make orders which are not specified in that section. It is useful to contrast the Review Officer's authority with that accorded the Tribunal to make orders under subsection 25(2):

> (2) The Hearings Tribunal shall decide the issue that is before it for a hearing and, without restricting the generality of the foregoing, the Hearings Tribunal,
>
> (a) [relates to a failure to comply with Part II of the Act]
>
> (b) where it finds that an employer has contravened subsection 9(2) by dismissing, suspending or otherwise penalizing an employee, may order the employer to reinstate the employee, restore the employee's compensation to the same level as before the contravention and pay the employee the amount of all compensation lost because of the contravention;
>
> (c) where it finds that an employer has contravened subsection (1) by reducing compensation, may order the employer to adjust the compensation of all employees affected to the rate to which they would have been entitled but for the reduction in compensation and to pay compensation equal to the amount lost because of the reduction;
>
> (d) may confirm, vary or revoke orders of review officers;
>
> (e) may, for the female job class that is the subject of the complaint or reference, order adjustments in compensation in order to achieve pay equity, where the Hearings Tribunal finds that there has been a contravention of subsection 7(1);
>
> (f) [relates to a finding in relation to a complaint under paragraph 22(2)(b)]
>
> (g) may order a party to a proceeding to take such action or refrain from such action as in the opinion of the Hearings Tribunal is required in the circumstances.

13. It is also significant that subsection 24(6), which tells complainants that they may request a hearing before the Tribunal, seems to be limited to orders made under section 24. Since section 24 does not provide for a subsection 9(2) order, even if a Review Officer made one, it appears that there is no mechanism by which the complainant (or an employer or bargaining agent named in the order) could request a hearing.

14. We see no reason to disagree with the Review Officer's conclusion that he cannot grant a remedy in relation to subsection 9(2). In other words, then, there is no power in a Review Officer, after investigating a complaint under subsection 9(2), to make an order which is based on a contravention of subsection 9(2) itself.

15. This conclusion does not mean that a complainant is stymied in bringing a subsection 9(2) allegation before the Tribunal. In another case, the Tribunal was notified under subsection 23(2) that a Review Officer had not been able to effect a settlement and had not made an order under subsection 24(3) with respect to a complaint filed with the Pay Equity Commission alleging a violation of subsection 9(2). The

Tribunal required that the individual employee involved file an application with the Tribunal if she wished the Tribunal to proceed with her complaint (see *Notification re Wentworth County Board of Education* (27 August 1990) 0116-90 (P.E.H.T.))[now reported at 2 P.E.R. 37]. The purpose of the application is to explain the allegation, which may well have been modified or refined through the Review Services process, to both the Tribunal and the respondent. The Tribunal will then put the matter on for hearing as it normally does after an application has been filed with it. In this case, of course, the Association did not make such an application to the Tribunal.

16. Thus the parties' dispute has not reached us in the appropriate way. We are mindful, however, that because of the Review Officer's approach to this matter, the Association would have had no reason to file an application with the Tribunal specifically alleging a contravention of subsection 9(2). Rather, it quite reasonably simply asked for compliance with the order the Review Officer *did* issue. Furthermore, the parties, not surprisingly, argued the case on the basis that they were dealing with subsection 9(2). They were made aware that there might be a difficulty with the nature of the order and they were invited to address the point. The parties had full opportunity to argue the case, both on the merits and on the issue of the status of the subsection 9(2) allegation. They argued it as a subsection 9(2) dispute and made it clear that they were satisfied to have us resolve that dispute, regardless of how it arrived at the Tribunal. We also believe that it would be of assistance to the parties if we dealt with their dispute, not only as redefined by the Review Officer, but in its original form. We emphasise that the fact that this is the first case in which this kind of order has come before the Tribunal has played a significant role in determining our approach.

### B. Further Comments on Subsection 9(2)

#### 1. General Comments

17. Subsection 9(2) of the Act reads as follows:

> 9. . . .
>
> (2) No employer, employee or bargaining agent and no one acting on behalf of an employer, employee or bargaining agent shall intimidate, coerce or penalize, or discriminate against, a person,
>
> (a) because the person may participate, or is participating, in a proceeding under this Act;
>
> b) because the person has made, or may make, a disclosure required in a proceeding under this Act;
>
> (c) because the person is exercising, or may exercise, any right under this Act; or
>
> (d) because the person has acted or may act in compliance with this Act, the regulations or an order made under this Act or has sought or may seek the enforcement of this Act, the regulations or an order made under this Act.

18. Such a section is intended to protect persons from suffering a penalty for enjoying or seeking to enjoy benefits which the legislation offers them and to discourage those who are subject to it from avoiding their obligations by, for example, discharging or otherwise penalizing employees. It is not intended to deprive an employer of its right to manage its workplace or to make changes in the workplace which do not otherwise offend the legislation. The specific character of the section is indicated by its limitation to certain

kinds of "protected" activity. It is not sufficient that there is only a general "connection" with "the pay equity process" to find that an employer's conduct has contravened subsection 9(2). Rather, it is necessary to establish, on the plain wording of the section, that the employer (for example) took action against an employee *because* the employee engaged in one of the activities given protection by the legislation.

19. A party making an allegation under subsection 9(2) must be prepared first to establish that the person was involved in a protected activity. The party must then establish that the action of the respondent had the kind of effect prohibited by subsection 9(2) and that the respondent acted *because* the person was engaging in the protected activity.

20. The usual requirement in a case is that the applicant must satisfy the decision-maker that the respondent has done what it, the applicant, says it has done and that that conduct constitutes a violation of the law. The applicant, in short, will lose if it fails to establish its allegations. In some instances, however, the law provides that the respondent carries the obligation to show that the allegations against it have no merit. It is important to realize that the *Pay Equity Act, 1987* does not contain such a "reverse onus" provision. In this, it is quite different from the Ontario *Labour Relations Act* which contains in section 66 a prohibition equivalent to that in subsection 9(2) of the *Pay Equity Act, 1987*, at least as far as employers are concerned (section 66 does not apply to employees or "bargaining agents"). The *Labour Relations Act*, however, also provides, in subsection 89(5), that in such cases "the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization", thus placing the onus on the employer respondent to satisfy the Labour Relations Board that it had a "legitimate" reason for its conduct. The effect is this: when the evidence is so evenly balanced that the decision-maker must resort to the placement of the onus, the employer will lose because it has not shown it did not commit the acts alleged. (See *Shaw-Almex Industries Limited*, [1986] OLRB Rep. Dec. 1800; appl'n for judicial review dismissed, January 12, 1988 (Div. Ct.)). Without a provision such as subsection 89(5), the normal onus applies. Thus under the *Pay Equity Act, 1987*, to find a contravention of subsection 9(2), we would have to be satisfied on a balance of probabilities that the Board's conduct falls within the conduct proscribed by subsection 9(2). The Board would not have to satisfy us that its conduct does not contravene subsection 9(2)

2. The Circumstances of this Case

21. The Association did not originally specify which paragraph of subsection 9(2) applied, but advised during argument, without objection, that it was relying on paragraph 9(2)(c): "because the person is exercising, or may exercise, any right under this Act". In our view, entitlement to a pay equity plan, without further involvement in the pay equity process, is a "right" under the Act. It would be surprising, for example, if conduct by an employer such as firing all women in female-dominated job classes in order to avoid pay equity were not caught by this section even though none of the women was actively involved in the pay equity process.

22. A change in working conditions could fall within the conduct proscribed by subsection 9(2): in this case, it is obviously a disadvantage to Mrs. Brown not to be able to leave the premises. Was the Board's decision to impose that requirement a response to the exercise of rights by Mrs. Brown?

23. The only evidence linking the Board's conduct with any exercise of right by Mrs. Brown is the timing of the motion, against a background of a long-standing practice. It is undeniable that the decision to restrict

her lunch by location or time was coincident with the determination of the pay equity plan and that likely without the plan, she would still be enjoying lunch off the premises. We are troubled by the timing of this restriction in conjunction with the approval of the pay equity plan and with a change in a fourteen year practice. Without more, we might have inferred that the Board was penalizing Mrs. Brown because she was benefitting from a pay equity plan. But if timing were sufficient, almost any action by an employer having negative effects on an employee which coincided with the establishment or implementation of a pay equity plan would contravene the legislation. Yet it is not impossible that the process of establishing pay equity will reveal other labour relations practices, even those of long standing, which require adjustment. Whether that contravenes the legislation or provides a basis from which an inference of contravention can be drawn, will depend on all the circumstances in a case.

24. Here the Board has provided an explanation for that timing which was not successfully rebutted by other evidence. Malcolm Hamilton, a Commissioner who was involved in the pay equity negotiations, explained that he first learned that Mrs. Brown took lunch off the premises and therefore was not at work forty hours a week, at the December 20th meeting with the Review Officer. As a result of the December 20th meeting, once the pay equity plan had been determined, the Board of Commissioners concluded that in order to ensure that the relevant positions were equal, the hours worked had to be equal and consistent with the requirements of the collective agreement, that is, forty hours.

25. The Association sought to rebut that explanation on the basis that the Board had known before then that Mrs. Brown took her lunch off the premises and on the basis that the collective agreement contemplated her taking lunch off the premises.

26. On the first point, the evidence called did not establish that the Board knew about Mrs. Brown's practice at lunch. Discussions of the joint pay equity committee took place on October 10 and 11, 1989. Along with representatives of the Board and the Association, the committee included the consultant hired to assist the parties, David Murray. The committee had before it "fact sheets" filled out by the employees describing their jobs, including hours of work. Dwight Thib, a representative of the Association on the committee, testified that Mr. Murray "should" have been aware of the lunch hours because he had the fact sheets. Yet he also said that he did not know what Mrs. Brown said about her hours of work on the fact sheet. Mrs. Brown herself "thought" she put her hours of work down, but she was not sure. Mr. Hamilton said that the fact sheet recorded her hours of work as "eight hours". Thus while it appears that hours of work were discussed in October and while there appears to have been some confusion on the point, no one was able to tell us that the relationship between Mrs. Brown's lunch hour and her hours of work (including the location) was specifically discussed, nor that that information was included on her fact sheet. (Neither party introduced the fact sheet as evidence.) Mrs. Brown further said she "assumed" Mr. Hamilton knew she took a lunch hour off the premises because he had seen her in the post office during the relevant period, but Mr. Hamilton explained that he thought she was there as part of her job since her duties included the mail.

27. Those issues *were* discussed at the December 20th meeting with the Review Officer, probably raised by Mr. Hamilton who knew that parties did not agree generally on the work period. By the time he left the meeting, Mr. Hamilton believed that Mrs. Brown had to work forty hours a week, the hours set out in the collective agreement, in order to establish the pay equity comparison.

28. Mrs. Brown's hours of work were discussed at the Board's February 13th meeting. (With respect to our colleague's view that the Board should have discussed Mrs. Brown's hours at a meeting between October 1989 and February 1990, we note that neither party called any evidence or made any submissions on any such requirements of the *Police Act*, on whether the Board held a meeting during that period, or on any implications which could be drawn from a requirement for, calling of or failing to call a meeting. The same observation applies to her speculation about why the Board dealt with this issue itself. In our view, it is inappropriate to speculate on and to base one's conclusions on matters not in evidence.) The Board believed that if the salaries were equivalent, the hours of work had to be equivalent, as well. The Board concluded that she would have to remain on the premises in order to work the appropriate number of hours consistent with the collective agreement on which the comparison was based. In the Board's view, that was forty hours at work; it did not allow for an hour a day off the premises. In contrast to the Board, the Association maintains that the collective agreement requires Mrs. Brown to work thirty-five hours a week and that it provides that she is to receive one hour paid lunch a day, for a total of forty hours pay.

29. We make no comment on whether the Board's interpretation of the collective agreement is correct. Both parties argued about that issue and gave evidence on their particular interpretation. It is not our task to interpret the collective agreement or decide which interpretation is correct. There is a mechanism for resolving disagreements under the collective agreement set out in that agreement. Needless to say, it does not involve the Tribunal or, more generally, the Pay Equity Commission. To be clear, the Board could be correct in its interpretation and yet be in contravention of subsection 9(2) or incorrect in its interpretation and yet not be in contravention of subsection 9(2).

30. There is no suggestion that the limitation on Mrs. Brown's lunch period is one which was necessitated by the operations of the police force which appear to be rather flexible; on the other hand, it has not, it seems, contributed to healthy labour relations or to a sense of fairness in Mrs. Brown. An outside observer could be forgiven for wondering why some arrangement could not be reached which would permit Mrs. Brown to leave the premises, even if the Board were correct in its interpretation of the collective agreement and felt obliged to apply it.

31. Nevertheless, we are required to assess allegations in the context of the *Pay Equity Act, 1987*. It is not sufficient to establish that the employer did "A" and that the result was "C"; it is also necessary to establish "B", that is, that the employer did "A", resulting in "C", to penalize the employee for engaging in an activity listed in paragraphs 9(2)(a)-(d). There are thus three elements to a subsection 9(2) violation: the action, the result and the "why". A failure to establish any of these elements is a failure to establish a violation. The Association failed to establish the "why": the evidence before us fails to establish on a balance of probabilities that the Board penalized Mrs. Brown for exercising a right under the Act. Put simply, the Association did not call sufficient evidence to support an allegation that the Board of Commissioners violated subsection 9(2) of the Act.

32. We come now to the actual order of the Review Officer which gives remedies under subsections 24(2) and (3) of the Act. Since there is not an order remedying a violation of subsection 9(2), the request for a direction to the employer to comply and the request that we set aside the order must relate to the order remedying a violation of subsection 7(1) and paragraph 22(2)(a) of the Act.

### C. The Status of the Review Officer's Order

33. The Association did not file a complaint with the Pay Equity Commission alleging a violation of subsection 7(1) or of paragraph 22(2)(a) of the Act. Rather, the Review Officer was evidently in the course of investigating and trying to settle the subsection 9(2) complaint when he formed (in the words of section 24) "an opinion" relevant to his power under subsections 24(2) and (3). The parties did not object to the Review Officer's making his order under subsections 24(2) and (3). It may also be fairly said, however, that they paid almost no attention to that aspect of the order, treating it as the Officer's way of circumventing the limitation on him with respect to subsection 9(2).

34. Did the Review Officer require a complaint in order to make the order he did? Subsection 24(6) does seem to contemplate orders which were not founded on complaints, since there is provision for requests for a hearing both by entities *named* in an order under section 24 and by those entities and a complainant *who had filed a complaint* which resulted in the order. In other words, a complaint may not be a necessary precondition to the Review Officer's exercise of power under section 24. But that does not mean it is an appropriate way to respond to a subsection 9(2) complaint. The Act denies a Review Officer the power to make an order in relation to subsection 9(2) and instead has provided that where the Officer cannot settle the complaint, the matter shifts to the Tribunal. Desirable or not, the intention of the Legislature is clear and should not be thwarted by resort to other sections of the Act, the purpose of which is likely to be, as in this case, a bad fit with the purpose of subsection 9(2).

35. Assuming that the Review Officer could make the order he did, it is not an order under subsection 9(2) which requires establishing a "why" not required for either subsection 7(1) or paragraph 22(2)(a) violations. Nor is the order bolstered by the addition of his opinion about the subsection 9(2) allegation. The original complaint was made in relation to subsection 9(2); the Review Officer has decided that there were contraventions of subsection 7(1) and paragraph 22(2)(a). Those findings of violation do not resolve the original complaint. Thus by this approach, the Review Officer has substantially changed the nature of the initial complaint and has made it difficult for the parties to proceed before the Tribunal on that complaint.

36. Parties wishing to pursue their subsection 9(2) allegations in the future must do so by filing an application directly with the Tribunal after the Review Officer notifies the parties and the Tribunal that the complaint has not been settled. On the other hand, any party wishing to deal with the actual order of the Officer, made under whichever portion of section 24, must be prepared to address the specific allegation underlying the order. That will not be an allegation under subsection 9(2), but under another section which has its own constituent elements. In this case, for example, we are asked to order compliance with, on the one hand, and to revoke, on the other, an order relating to subsection 7(1) and paragraph 22(2)(a) of the Act. Despite our findings with request to subsection 9(2), it is therefore necessary to consider those matters separately.

37. Subsection 7(1) and paragraph 22(2)(a) of the Act require us to examine the content of the pay equity plan. The pay equity plan requires that the "Civilian Staff" position be compared to the "Dispatcher" position and that an adjustment of $2,849.39 be paid for 1989. The "job rate" was calculated on an annual basis. There is no dispute that that was paid. Those were the terms of the plan and they were implemented. Under the circumstances of this case, subsection 6(1) states that "pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a

[comparable] male job class". Here the job rate has been made equal. There is no evidence that the plan has not been implemented according to its terms.

38. The hours of work were a factor under consideration in the determination of the comparison between the dispatcher and the civilian clerk positions. The dispatchers and the clerk obviously work very different hours in practice: the civilian clerk works a "normal" day from 8:30 a.m. to 4:30 p.m., while the dispatchers work twelve hour shifts with two thirty minute breaks. Nevertheless, the comparison was accepted by the parties. There was no evidence on whether the change in where Mrs. Brown could take her lunch or of whether the reduction from an hour to half an hour had any impact on the comparison or somehow made the comparison invalid. Thus there is no evidence of a violation of the obligation to "establish and maintain compensation practices that provide for pay equity".

## IV. ORDERS

39. The order of the Review Officer dated June 5, 1990 in this matter is hereby revoked.

40. The compliance application in Tribunal File No. 0106-90 is hereby dismissed.

## DECISION OF MELDA OKOYE, FEBRUARY 27, 1991

1. I dissent from the finding of the majority, that there was no violation of section 9(2) in this case. The Board claimed that Mrs. Brown's lunch hour was changed as soon as it became aware of her actual hours of work and that this change had nothing to do with pay equity. Mrs. Brown was advised of this change by letter on February 19, 1990, the same date the pay equity plan was posted.

2. Doubt was cast on the Board's explanation by evidence led before the Tribunal. Mr. Thib of the Association said that on October 10 and 11, 1989 he discussed the variance of the hours worked by the civilian clerk and by the dispatcher with the committee. Furthermore, Mr. Hamilton testified that at the October 10 and 11, 1989 meetings of the pay equity committee, he became "aware of the hours" of these two employees during "talks about working conditions", and that the committee talked "as a group as a whole about seven hours and one hour lunch" throughout these meetings. Two Police Commissioners were present at these meetings: Mr. Hamilton and Mrs. Armstrong.

3. Mrs. Brown testified that the fact sheet she prepared for the pay equity evaluation process stated that she worked from Monday to Friday, 8:30 a.m. – 4:30 p.m. taking a one hour lunch period. There was undisputed evidence from Carole Brown that when she was hired in 1976 by Chief Jelly, there was an agreement between them that she would work "8:30 a.m – 4:30 p.m. with a one hour lunch: 12:00 – 1:00 off the premises".

4. On the basis of the above evidence, it is clear that members of the Board knew what hours Mrs. Brown was actually working at least four months in advance of February, 1990 when those hours of work were changed. For this reason, I am not persuaded that the Board's explanation that the change was unrelated to pay equity is credible.

5. If the Board was solely concerned about the hours of work by Mrs. Brown and wanted to correct them to conform to their interpretation of the collective agreement, why did they wait four months to do so? The collective agreement, article 2.01, provides that "the Board has the authority to maintain order and efficiency of the Police Force subject to the *Police Act* R.S.O 1980 as amended and the Regulations R.S.O 1970 as amended." Regulations 791 Section 34(2) provides: "A board shall hold at least one regular meeting every 3 months".

6. There was no evidence led as to whether a meeting was held between October 1989 and February 1990. If the matter of Mrs. Brown's hours conforming to the collective agreement was so important, it should have been discussed then. Alternately, a special meeting could have been called to deal with the matter. Whether or not there was a meeting at the end of 1989, and I am assuming that the Board of Commissioners of Police for New Liskeard does follow the *Police Act* and its Regulations, the question remains: why wait four months to correct a perceived violation of the collective agreement?

7. Furthermore, a question is raised as to why the Board would itself deal with such a perceived infraction – unless it was directly related to the pay equity plan. Although no evidence was led on this issue either, in the normal course of employment relations, one would expect that an employee who was found to be extending her lunch hour in violation of the collective agreement would be disciplined by her immediate supervisor, and not by the governing body of the workplace, again pointing to a direct connection with the posting of the pay equity plan.

8. In fact, it was not until the Commission's meeting on Tuesday 13th February, 1990 when the following motion was moved by Mr. Hamilton seconded by Mrs. Armstrong – both members of the Pay Equity Committee:

> "That the order, as issued by the Pay Equity Commission dated January 5th 1990, be received and that a posting be placed indicating that the clerical position will be paid equivalent to the Dispatcher position effective January 01, 1990 and that the work hours be as described in Article 9.01 of the work agreement";
>
> Further, that Chief Jelly be directed by letter that the individual filling the clerical position must remain at the usual work location for the work hours as described in the work agreement." This is one motion, one thought process, one action, and one result which clearly links the pay equity plan to the change in Mrs. Brown's hours. The plan was posted on February 19, 1990 and Carole Brown's working conditions were changed as of that date.

9. This sequence of events leads to the inescapable conclusion that the relationship between the posting of the Pay Equity Plan and the change of hours is more than the coincidence the majority claims. Given the time elapsed between the pay equity committee meetings in October and the action of the Board in February, the explanation advanced by the Board does not seem credible. On the balance of probablities, I would conclude that as a direct result of exercising her rights under the *Pay Equity Act*, Carole Brown was penalised by a change of her working conditions, hours and compensation, contrary to section 9 (2). The Police Commission gave with one hand and took back with the other.

10. It is my view the association has proven that the Board is in violation of the *Act*. A reverse onus provision would have strengthened Mrs. Brown's position even more. There is no express reverse onus on the employer in the *Act*. How does an individual or bargaining agent establish that a person has been intimidated, coerced, penalized, discriminated against or otherwise dealt with contrary, because they are exercising any right under the *Pay Equity Act*?

11. It is very difficult to have direct evidence of the employer's misconduct. Other statutes such as the *Labour Relations Act* in S.89(5) allow;

> "The burden of proof that any employer or employers organization did not act contrary to this *Act* lies upon the employer or employer's organization."

12. This provision was obviously introduced into the *Labour Relations Act* because of the difficulty in proving that someone has been penalized under the statute. It would be beneficial to have such a provision in the *Pay Equity Act*. The omission makes it very difficult for women to prove their rights under the *Act*.

13. Although this issue was not argued before us, I am also of the view that the evidence demonstrated the actions of the Board violated section 9(1).

14. In conclusion from the evidence, clearly

(a) there was a violation of sections 9(1), 9(2) and

(b) the case was properly brought before us by the Review Officer according to the *Pay Equity Act*.

15. Pursuant to section 25 (2)(b) of the *Act*, I would order the Board to reinstate Mrs. Brown's working conditions as they existed on February 18, 1990 and compensate her for having worked an extra 2 1/2 hours per week from February 19, 1990 to the date of this decision. She suffered because she was no longer able to leave the premises during this period; concretely this meant she was required to remain in an area where the jail cells, prisoners, locker room and fire hall were all located. In my view, these are clearly stressful working conditions, but no evidence was led or representations made as to the appropriate calculation of any compensation owing to her on this basis.

16. I wish to comment on the Review Officer's handling of this matter. The Association made an application to Review Services alleging a change of working conditions, a change of the plan, and a violation of section 9(2). After an investigation, the Review Officer issued the order of June 5th, 1990. This order was subject to applications to the Tribunal from both the New Liskeard Board of Commissioners of Police and the Association.

17. The Review Officer was correct in the approach he took and that in fact, not only is there a section 9(2) allegation to adjudicate in this case, there is also an order which finds a violation of section 7(1) based on a finding under sections 24(2), (3) that the pay equity plan was not being implemented according to its terms.

18. Under Section 34(2) Review Officers are obligated "to monitor the preparation and implemetation of pay equity plans". In the course of his investigation of the Association's application to the commission alleging a violation of section 9(2), the Review Officer in question came to the opinion that the plan he had ordered January 5, 1990 was not being implemented according to its terms and accordingly made an order under section 7(1). While this officer was of the opinion that he could not order a remedy under section 9(2), he came to the above noted opinion in accordance with section 24(2) which was quite proper and within his jurisdiction.

19. In the circumstances of this case, I am of the view that the Board's action contravened sections 9(1) and (2) and section 7(1) of the *Act*. But, not all section 9(1) or (2) violations will necessarily be section 7(1) violations. For example, an employee might be dismissed on account of her involvement in pay equity negotiations. That would be a section 9(2) violation. If no plan were in place, however, would that be a section 7(1) violation also? That is not so clear. For this reason, Review Officers ought not to automatically deal with section 9(2) allegations by making orders under section 7(1) of the *Act*. In my view, there is a serious omission in that Review Officers are allowed to investigate allegations of violations of sections 9(1) and (2), but are not given any direct power to deal with such allegations. The *Act* should be amended to give Review Officers the power to make orders in relation to alleged violations of these sections.

**0014-89** Ontario Nurses' Association, Applicant v. City of Timmins and Town of Iroquois Falls and Township of Black-River Matheson and Town of Cochrane and Township of Glackmeyer and Town of Smooth Rock Falls and Town of Kapuskasing and Township of Fauquier-Strickland and Township of Moonbeam and Townships of Val Rita-Harty and Township of Matice-Valcote and Corporation of the Township of Hornepayne and Porcupine Health Unit, Respondents

**Before:** Mary Ellen Cummings, Vice Chair and Geri Sheedy and Janet Slone Taylor, Members

**Cite As: Porcupine Health Unit (No.1) (1991), 2 P.E.R. 78**

**PEHT - Jurisdiction - Bias**

**PEHT - Jurisdiction - Natural Justice**

The issue raised by the application was "who is the employer". At the end of the Respondent's argument, the Tribunal invited the parties to make submissions on the criteria for determining this issue set out in *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R. 17. Specifically, the parties were asked to address whether the outcome of the application would be altered if the Tribunal were to change its focus and consider either exclusively or with greater weight the criteria of who has control over compensation practices and who attaches value to work. The Applicant claimed that both the timing and the essence of the question gave rise to an apprehension of bias, violated the principles of natural justice and constituted an excess of jurisdiction.

The Tribunal held that the Applicant's allegations were not substantiated.

Courts have found attitudinal bias to exist when adjudicators usurp the role of counsel. Assuming for the purposes of this case that that can include usurping counsel's role in argument, the posing of the question does not amount to such usurpation. It was merely an invitation to all counsel to make submissions on a point that was in the minds of the panel. Allegations that an adjudicator has prejudged a case will succeed only where the statement made suggests that the adjudicator has closed her mind to any conclusion other than the one contained in the statement. The question posed did not indicate a predisposition to reach a particular conclusion.

There was no denial of natural justice. Natural justice requires that the parties know the case to be met: both the issues in dispute and the possible outcomes. The Applicant knows the issue in dispute is the identity of the employer, and that the possible outcomes are that either the Respondent Health Unit or the Respondent Municipalities will be found to be the employer. If the Tribunal were to accept the proposition that the Tribunal must always determine cases on the basis established by another panel, it would fetter its discretion, a reviewable error of law. There may be good policy reasons for following earlier decisions but that is different from a legal obligation to do so.

There was no denial of natural justice in the Applicant's being advised of the change in focus at the end rather than the start of the case. To succeed on this allegation, the Applicant must show that the question expanded the scope of the enquiry and that the Applicant was therefore prejudiced by an inability to call evidence and make argument on the expanded enquiry. The question did not expand the enquiry. Nevertheless, the Tribunal has decided to give the parties the opportunity to make submissions on the posed question and to call further evidence if they desire.

**Tribunal Member Geri Sheedy Concurred In The Result:**

The timing of the question allowed the Respondent's Counsel an opportunity to argue that the Tribunal should look at changing the focus of the tests to be used after he had concluded his final argument. If he had concerns, he could and should have raised them in his argument. The Tribunal has the right to ask the parties for submissions at any time. Nevertheless there are certain times when requesting submissions is more appropriate, more beneficial to the parties and less disruptive to the hearing.

**T.É.S. - Compétence - Parti pris**

**T.É.S. - Compétence - Justice naturelle**

La requête portait sur l'identification de l'«employeur». À la fin de la plaidoirie de l'intimé, le Tribunal a invité les parties à lui présenter des observations sur les critères ayant servi à résoudre cette question et énoncés dans *Haldimand- Norfolk (no 3)*, (1989), 1 P.E.R. 17. En fait, il a demandé aux parties de déterminer si l'issue de la requête serait différente si le Tribunal changeait son point de mire et tenait compte, exclusivement ou presque, du critère suivant : qui décide des pratiques de rétribution et qui fixe la valeur du travail. L'auteur de la requête a prétendu que l'à-propos et le fond de la question présageaient des risques de préjudice, enfreignaient les principes de justice naturelle et constituaient un excès de pouvoir.

Le Tribunal a statué que les allégations de l'auteur de la requête n'étaient pas fondées.

L'allégation, par l'avocat, du risque de préjudice n'est pas fondée. Les tribunaux ont conclu que les préjugés d'attitude existent quand les arbitres usurpent le rôle des avocats. Le fait, en l'espèce, de présumer que cela peut comprendre l'usurpation du rôle de l'avocat en matière de plaidoirie ne correspond pas à une telle usurpation. Il s'agissait, dans la présente affaire, uniquement d'une invitation à tous les avocats de présenter des observations sur une question qui préoccupait tous les membres du comité. Les allégations portant qu'un arbitre a préjugé une affaire ne seront reconnues que si la déclaration faite donne à penser que l'arbitre a refusé de tenir compte de n'importe quelle conclusion à l'exception de celle contenue dans la déclaration. La question posée n'indiquait pas une prédisposition à arriver à une certaine conclusion.

Il n'y a eu aucun déni de justice naturelle. Les principes de justice naturelle exigent que les parties soient au courant de l'affaire, à savoir : les questions en litige et les résultats éventuels. L'auteur de la requête sait que la question en litige concerne l'identification de l'employeur, et que le résultat éventuel est que soit la circonscription sanitaire, soit les municipalités, seront reconnues comme l'employeur. Si le Tribunal acceptait la proposition voulant qu'il doive toujours trancher les cas en fonction des conclusions établies par un autre comité, il enchaînerait ses pouvoirs discrétionnaires, ce qui constituerait une erreur de droit pouvant faire l'objet d'une révision. Il peut exister de très bonnes raisons pour suivre les décisions rendues antérieurement, mais cela est différent de l'obligation légale de ce faire. L'auteur de la requête n'a pas été porté à croire que les tests et que leur application ne changeront jamais.

**La communication à l'auteur de la requête, à la fin plutôt qu'au début de l'affaire, du changement de point de mire ne constitue pas un déni de justice naturelle. Pour réussir à faire valoir ce point, l'auteur de la requête doit prouver que la question déborde du cadre de l'enquête et qu'il subit, par conséquent, un préjudice en raison de son incapacité de présenter des preuves et de faire une plaidoirie dans le cadre de l'enquête élargie. La question soulevée ne débordait pas du cadre de l'enquête. Néanmoins, le Tribunal a décidé de donner aux parties la possibilité de présenter des observations sur la question posée et de présenter d'autres preuves si elles le désiraient.**

**Accord de Geri Sheedy, membre du Tribunal, avec le résultat:**

**Le moment auquel la question a été posée a donné à l'avocat de l'intimité la possibilité de soutenir que le Tribunal devrait envisager de modifier le point de mire des tests qui devaient être utilisés à la fin de sa plaidoirie finale. S'il avait eu des préocupations, il aurait pu et aurait dû les soulever dans sa plaidoirie. Le Tribunal a le droit de demander aux parties de présenter des observations en tout temps. Néamoins, il existe des moments où il est plus approprié et plus avantageux pour les parties et moins pertubateur en ce qui concerne le litige de demander des observations.**

## DECISION OF THE TRIBUNAL, MARCH 6, 1991

1. On December 20, 1990, at the end of the Respondents' argument, the panel invited the parties to make submissions on the following question;

> The *Haldimand–Norfolk* case set out four tests or criteria upon which the panel determined who was the employer. The panel in that case indicated that the tests may evolve. We would like to hear your comments about whether or not the outcome of this case would be altered if we were to change our focus and consider either exclusively, or with greater weight, the criteria of who has control over compensation practices and who attaches the value to work.

Ms. Sheedy dissented from the decision to pose the question.

2. When the hearing resumed on January 21, 1991, Counsel for the Applicant objected to the appropriateness of the panel posing such a question and requested a ruling on the matter.

3. She argued that the posing of the question at the conclusion of the Respondents' argument created a perception of bias in favour of the Respondents because it invited the Respondents to make an argument that they had not made. Further, she argued that the Tribunal had acted in a manner which misled the Applicant, thus indicating bias on the part of the Tribunal.

4. She also argued that the posing of the question at the end of the hearing was a denial of natural justice. She argued that her client was entitled to rely on the formation and application of the tests as set out in *Haldimand–Norfolk (No.3)* (1989) 1 P.E.R. 17, and applied in two other cases. She said that if the Tribunal had intended to change the tests or give more weight to one criteria, we should have advised the parties at the start of the case.

5. She further argued that the Tribunal had exceeded its jurisdiction by raising an issue that was not in issue between the parties. She said that since none of the parties had argued that the tests ought to be changed, it was improper for the panel to raise the issue.

6. She indicated that if she were to make submissions on the question, she reserved the right to lead further evidence and make further argument. When asked if the opportunity to call further evidence and make further argument would resolve her concerns she stated that it would resolve her procedural concerns but that her primary argument was that her client was entitled to have its case evaluated on the basis of the existing tests.

7. Counsel's allegations would seem to fall under the category of attitudinal bias, that is, she alleges that both the question and its timing show an attitudinal bias in favour of the Respondents. Our review of the case law indicates that the courts have found attitudinal bias when adjudicators have descended into the

arena and taken over the role of counsel in the examination and cross-examination of witnesses. Although the cases deal with situations where the adjudicator has descended into the arena with respect to the calling of evidence and posed questions to witnesses, we are prepared to accept for the purpose of this case, that adjudicators could also improperly descend into the arena in argument.

8. In *Majenic v Natal*, [1968] 1 O.R. 189 (C.A.), at page 204, the Court said;

> The right to intervene is one of degree and there cannot be a precise line of demarcation but if it can be fairly said that it amounted to the usurpation of the function of counsel it is not permissible.

Our decision to pose a question does not amount, in our view, to usurping the function of Counsel for the Respondents. It was merely an invitation to all Counsel to make submissions on a point that was in the minds of the panel. It is not unusual for adjudicators to ask questions at any point in the proceedings and so long as that questioning does not extend to usurping the role of counsel it is entirely permissible.

9. Counsel's allegations also suggest that the posing of the question indicates bias in that the panel has prejudged the case. The case law indicates that such an allegation will succeed only where the a statement made by an adjudicator suggests that she has closed her mind to any other conclusion than the one contained in the statement ( *R v Pickersgill et al, Ex p. Smith et al* (1970), 14 D.L.R. (3d) 717 (Man. Q.B.)). The case law principally deals with situations where the adjudicator has made statements outside of the hearing that indicate a particular point of view. The courts have said that the making of the statement without more is not enough to conclude that the adjudicator has closed her mind. There must be evidence that the adjudicator has closed her mind to any other possible conclusion. The question posed by the panel did not indicate a predisposition to reach a particular legal conclusion on the ultimate question before us. We merely sought submissions on a question that may be relevant to our determination of the ultimate question.

10. We turn now to the allegations that the Applicant has been denied natural justice because it is entitled to rely on the formation and application of the tests set out in *Haldimand-Norfolk (No.3)*. Clearly, the parties are entitled to know the case that must be met. They must be advised of the issues in dispute and the possible outcomes. That does not appear to be the problem in this case; the Applicant knows that the issue in dispute is the identity of the employer of the nurses in the health unit and that the possible outcomes are either that the Respondent Health Unit or the Respondent Municipalities will be found to be the employer.

11. Counsel is alleging, however, that once the Tribunal has determined the basis on which one case will be decided, it must consider all similar cases on the same basis or in the alternative, if the basis is to be changed, that the Applicant has the right to be so apprised, in advance of the proceedings.

12. If we were to accept the proposition that the Tribunal must always determine cases on the basis established by another panel of the Tribunal, we would fetter our discretion, a reviewable error of law. In a given case, there may be good policy reasons for following earlier decisions, but that is different from a legal obligation to follow them.

13. Further, the Applicant has not been led to believe that the tests and their application will never be changed. The *Haldimand–Norfolk (No.3)* decision itself said at paragraph 51;

> We do not intend these tests to be all encompassing. As with any new statute, interpretation must be approached in an incremental fashion, having regard to the possibility that future cases may add to those tests.

Since that decision, we have seen further development in the tests in *Middlesex and London* (1989), 1 P.E.R 89 and *Metropolitan Toronto Library Board* (1989), 1 P.E.R. 112, which have provided guidance as to how the fourth criterion may be applied.

14. The Applicant alternatively argued that it has been denied natural justice in not being advised of the proposed change in focus at the start of the case. To succeed, the Applicant must show that the panel's question expanded the scope of the enquiry and that the Applicant has been prejudiced in that it cannot now call evidence and make argument on the expanded enquiry (see *Danakas v War Veterans Allowance Board, Canada* (1985), 10 Admin. L.R. 110).

15. As already stated, we do not believe that the question expanded the enquiry. It did not add to the issues that are in dispute nor did it add to the possible outcomes. At most, the Tribunal is looking to change its focus on the issues. The panel did not propose adding new criteria. Instead, it proposed putting greater weight on some of the criteria set out in *Haldimand–Norfolk (No.3)*. The Applicant has led evidence with respect to those criteria.

16. However, in this case, we exercised our discretion and gave the parties an opportunity to make submissions on the possible change in focus. We are also prepared to exercise our discretion and give the parties an opportunity to call further evidence.

17. In summary, we do not find that the Tribunal is biased nor has it breached the Applicant's right to natural justice.

18. At the resumption of the hearing, the parties may address the posed question and advise if they intend to call further evidence.

## DECISION OF TRIBUNAL MEMBER, GERI SHEEDY, MARCH 6, 1991

1. I concur with the majority decision on the question of bias and the issue of natural justice.

2. However, I wish to comment on my reason for dissenting on the posing of the question. My concern was with the appropriateness of the timing of the question, in that it allowed the Respondent Counsel an opportunity to argue that the Tribunal should look at changing the focus of the tests to be used after he had concluded his final argument. If the Respondent had concerns about the tests to be applied, or the focus of those tests, to determine the identity of the employer in this case, he could and should have raised them in his argument, especially since the Applicant argued their applicability. It is understandable that the Applicant was upset with the timing of the question posed by the majority.

3. I recognize the Tribunal's right to ask the parties for submissions at any time during the hearing and even at the conclusion of the hearing. Nevertheless, there are certain times that are more appropriate than others to request submissions, as well as being more beneficial to the parties and less disruptive to the hearings. In fact, in this case, the request caused one of the parties to allege the perception of bias and a denial of natural justice. We were required to adjourn the hearing and prolong the disposition of the case, due to the request for submissions and the allegations that followed.

4. Although I had grave concerns, the decision to allow the parties to call further evidence and to re-argue the question of the focus of the tests or the weight to be given to the tests used, while unfortunately lengthening the hearing, alleviates my concern.

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**0131-90 IN THE MATTER** of a Referral under subsection 24(5) of the *Pay Equity Act, 1987* relating to the Senior Officers' Association of the Timmins Police Force and the Board of Commissioners of Police for the City of Timmins

**Before:** Ralph Palumbo, Vice Chair and Members Bruce Budd and Janet Slone Taylor

**Cite As: Re Timmins Board of Commissioners of Police (No. 2) (1991), 2 P.E.R. 82**

**Practice and Procedure – Referrals**

**A Review Officer formed the opinion that neither of the parties had complied with his order and referred the matter to the Tribunal. Neither party made an application to the Tribunal. In *Re Timmins Board of Commissioners of Police (No. 1)* (1990), 2 P.E.R. 50, the Tribunal directed the parties to make submissions as to how to proceed. The Parties did not respond specifically to the Tribunal's questions, but instead indicated that they were still in the process of negotiating pay equity.**

**The Tribunal held that it was not appropriate for it to proceed with the referral.**

**The *Act* provides that the Tribunal must hold a hearing where a review Officer refers a matter to it. The Rules of Practice provide that in such circumstances the applicant before Review Services shall be the applicant before the Tribunal and shall comply with the rules governing applications. It does not make any sense to apply this rule in these circumstances since the Review Officer states that the applicant at review services has not complied with the order. In the circumstances, the Tribunal concludes that it is not appropriate to proceed further. However, it remains open to either party to apply to the Tribunal to seek compliance.**

**Pratique et procédure – Renvois**

**L'agent de révision était d'avis que les parties n'avaient pas respecté son ordre et il a renvoyé la question au Tribunal. Aucune partie n'a présenté de requête au Tribunal. Dans *Commission de police de Timmins (no 1)* (1990), 2 P.E.R. 50, le Tribunal a ordonné aux parties de lui présenter des observations sur la marche à suivre. Les parties n'ont pas répondu spécifiquement aux questions du Tribunal mais elles ont indiqué qu'elles étaient encore en train de négocier un programme d'équité salariale.**

**Le Tribunal a statué qu'il n'était pas approprié de donner suite au renvoi.**

**La *Loi* prévoit que le Tribunal doit tenir une audience si un agent ou une agente de révision lui renvoie une question. Les Règles de pratique prévoient que dans ce cas, l'auteur de la requête devant les Services de révision a également cette qualité devant le Tribunal et qu'il doit respecter les règles concernant les requêtes. Il n'y a pas lieu d'appliquer cette règle dans la présente affaire car l'agent de révision précise que l'auteur de la requête, à l'étape de l'audience devant les Services de révision, n'a pas respecté l'ordre. Dans ces circonstances, le Tribunal conclut qu'il n'est pas approprié de donner suite au renvoi. Toutefois, chacune des parties a toujours le droit de demander au Tribunal, par voie de requête, de faire respecter l'ordre.**

**DECISION OF THE TRIBUNAL, MARCH 15, 1991**

1. The issue in this case is how the Tribunal ought to deal with a Referral by a Review Officer under subsection 24(5) of the *Pay Equity Act, 1987*, S.O. 1987 c.34 (the "Act"), in circumstances where the Referral states that neither of the parties here has complied with the Officer's Order. The difficulty is that neither party has made an Application to the Tribunal and therefore there is no one who will take carriage of the proceedings.

2. On October 16, 1990 the Review Officer referred this matter to the Tribunal pursuant to subsection 24(5) of the *Act*. The Referral stated that the Officer's Order of July 23, 1990 was not being complied with. The Officer further clarified the situation by filing another Referral dated October 24, 1990 about the same Order. This Referral stated that the Board of Commissioners of Police for the City of Timmins (the "Board") and The Senior Officers' Association of the Timmins Police Force (the "Association") have not complied with the Officer's Order.

3. The Review Officer's Order of July 23, 1990 states:

> I was appointed Review Officer in this matter on April 10, 1990 pursuant to an application for Review Services submitted by the Association dated February 23, 1990. The parties were negotiating a pay equity plan with a mandatory posting date and, if required, a first adjustment date of January 1, 1990. In order to investigate the matter and attempt to effect a settlement, I met with the parties on May 24, 1990....
>
> As the parties have not sought male comparators from within their own bargaining unit and only evaluated one male job class in the establishment, it is obvious that they have not complied with Section 6 of the *Act*. Therefore I will be issuing an order in accordance with Section 24(1) of the *Pay Equity Act,1987*....
>
> THE ORDER
>
> I hereby order the Board of Commissioners of Police for the City of Timmins and the Senior Officers' Association to compare the female job classes in the Association's bargaining unit with male job classes in the establishment in a manner consistent with the requirements of Section 6 of the *Pay Equity Act,1987*. The parties shall advise me of their findings in this regard on or before September 17, 1990....
>
> Further to my appointment under Section 16(1) of the *Act*, I will monitor the parties' continued progress...

4. As we noted in our decision of November 5, 1990, this matter raises some interesting and difficult questions of both procedure and substance. For that reason, and in order to comply with subsection 25(1)(c) of the *Act*, which requires that the Tribunal hold a hearing when a Review Officer refers a matter to the Tribunal under subsection 24(5), we requested written submissions from the parties respecting the following issues:

i. Are the parties, or either of them, alleging that the Review Officer's Order of July 23, 1990 has not been complied with? If so, is that party prepared to make an Application to the Tribunal?

ii. Non-compliance Applications are dealt with under Rules 1.04 and 1.05 of the Tribunal's Rules of Practice. It is unclear whether they apply in the circumstances of this case. The Tribunal is requesting submissions respecting whether the Rules of Practice, and in particular Rules 1.04 and 1.05, do apply in the circumstances of this case? If so, which party in this case is the Applicant and which is the Respondent?

iii. Is this matter properly before the Tribunal as it appears that the Review Officer was appointed pursuant to subsection 16(1) of the *Act* whereas the Referral was made under subsection 24(5) of the *Act*?

We also directed the Registrar to serve notice of our Decision on the Pay Equity Office (the "Office") and invited its submissions on question 3 above.

5. The Tribunal received submissions from the Office on all three issues. The Board chose not to respond to the issues but simply wrote indicating that it had submitted another proposal to the Association "in an effort to resolve pay equity without the involvement of The Pay Equity Tribunal." Likewise, the Association did not respond specifically to the issues but did indicate that it felt that it was "neither Applicant nor Respondent at this time." The Association further indicated that the matter was "advanced to the Tribunal prematurely by the Pay Equity Review Officer" and that "the matter remains at the negotiation stage between the parties to attempt to mutually resolve the issue and comply with the Pay Equity Legislation." The Association also indicated that further meetings between the parties were being arranged to further discuss the issue.

6. We address two specific issues in this decision:

i. The application of Rule 1.04 of the Tribunal's Rules of Practice, and

ii. The appropriate way for the Tribunal to proceed in a case of this nature. Is there a mechanism under the *Act* by which we can deal with this Referral in an effective manner?

**(1) Rule 1.04 of the Tribunal's Rules of Practice**

7. Subsection 24(5) states:

> (5) Where an employer or a bargaining agent fails to comply with an order under this section, a review officer may refer the matter to the Hearings Tribunal.

As we have noted, subsection 25(1)(c) of the *Act* provides that the Tribunal must hold a hearing "if a review officer refers a matter to the Hearings Tribunal under subsection 24(5)."

8. Once the matter is before the Tribunal following a Referral by an Officer, the usual course is to refer to Rule 1.04 of the Tribunal's Rules of Practice. Rule 1.04 provides as follows:

> 1.04 When a Review Officer decides that a settlement cannot be effected and that he or she will not be making an order, or refers the matter to the Tribunal, a hearing shall be held. The Applicant before the Review Officer shall be the Applicant before the Tribunal and shall comply with the Rules governing applications.

Does it make sense to apply Rule 1.04 in this case? We think not. It would require the Association to be the Applicant before the Tribunal. Given that the Referral states that the Association is one of the parties that has not complied with the Officer's Order, this would place the Association in a somewhat awkward position. The Association would be required under Rule 1.04 to bring the alleged non-compliance forward when it is one of the parties against whom the allegation is made.

**(2) How should the Tribunal proceed in a case of this nature?**

9. In this case, neither the Board nor the Association is alleging that the Review Officer's Order has not been complied with. Furthermore, neither party appears to be prepared to make an Application to the Tribunal alleging that the Order has not been complied with. The question for us is whether, in light of these circumstances, the Tribunal should continue with this Referral?

10. It is implicit that in most hearings before the Tribunal, parties will present evidence for the Tribunal to consider. In the normal course this is what occurs. In this case, however, where the Referral states that neither party has complied with the Officer's Order, a rather perplexing problem arises. Who is it that must present evidence to substantiate the alleged non-compliance? There is no "natural" Applicant in this case; that is, someone who has made an allegation which he or she must prove with evidence before the Tribunal. The Office recognizes this difficulty. In its submissions it states:

> In a sense the Tribunal panel is faced with two 'Respondents' and no 'Applicant' as these roles of making or, defending a case are generally known.

11. It is clear that neither the Board nor the Association wishes to pursue the Referral, and therefore the allegation of non-compliance, and the case in support of it, are left dangling, without anyone who will bring it forward. There are no provisions in the *Act* which assist us in these circumstances. Whereas subsection 24(5) empowers the Review Officer to make a Referral to the Tribunal, the *Act* is silent as to the appropriate course for the Tribunal to follow in the circumstances of this case.

12. In its submissions, the Office made an interesting argument respecting the nature of the hearing that would be undertaken by the Tribunal if we hear this Referral. In this case, neither the Board nor the Association has requested a hearing before the Tribunal respecting any substantive pay equity issue being negotiated between them. Rather, the Tribunal has before it a Referral by the Review Officer. In these circumstances the Office argues that where there is no request for hearing by either party under subsection 24(5) of the *Act*:

> ... both section 24(5) 'Respondents' are required to respond only to the question of compliance; the merits of the order are presumably not at issue. This approach will likely result in a relatively contained hearing; unless the parties establish that they have complied with the order, the Tribunal is being asked by the section 24(5) referral to simply confirm the order by decision under section 25(2)(d).

13. With respect, this approach does not resolve the issue of who is the Applicant and has carriage of these proceedings. There are other difficulties with this approach. In this case, neither the Board nor the Association has any facts to respond to. Furthermore, there is no mechanism in the *Act* which would require the parties to come forward and "establish that they have complied with the order" of the Review Officer once a Referral under subsection 24(5) is made. Rather, during the course of the hearing of the Referral, the party against whom an allegation is made may, in the course of its response, attempt to prove that the Order was complied with. However, this scenario assumes the existence of a party who has made such an allegation, and has complied with the Tribunal's Rules governing Applications. In this case no such party exists.

14. We also disagree with the Office's contention that "the Tribunal is being asked by the subsection 24(5) Referral to simply confirm the order by decision under section 25(2)(d)." Subsection 25(2)(d) provides that the Tribunal "shall decide the issue that is before it for hearing and... may confirm, vary or revoke orders of review officers." In our view the merits of the Officer's Order are not before us. What is before us is the Officer's Referral. The Tribunal is not being asked to confirm, vary or revoke the Order in question. There is no request to make a decision on the merits of the Order. Certainly that is not a remedy that is contained in the Referral before us.

15. For the reasons noted above, we have concluded that it is not appropriate for us to proceed further with this Referral. However, the Tribunal's decision not to proceed further with this Referral in no way impairs the authority of the Officer's Order which must still be complied with. It remains open to either party to apply to the Tribunal to seek compliance with that Order. Given the decision in this case it is not necessary to deal with the applicability of Rule 1.05 in these circumstances or the third question we posed in our decision of November 5, 1990.

**0151-90** Corporation of the City of Peterborough, Applicant v. Peterborough Professional Fire Fighters' Association, Local 519, Respondent

**Before:** Patricia Hughes, Alternate Chair, and Members Donald Dudar and Geri Sheedy

**Appearances:** Richard Taylor and Murray Hynes for the Corporation of the City of Peterborough; Cathy Lace, Paul Brown, Judy Harris and Kitch Millard for the Peterborough Professional Fire Fighters' Association

**Cite As:** **Peterborough** (1991), 2 P.E.R. 86

**PEHT – Hearing – Prima facie case**

**Practice and Procedure – Dismissal Without a Hearing**

**The Applicant objected to a Review Officer's order directing that certain job classes in its establishment were of comparable value. The Respondent moved to have the application dismissed on grounds that it did not disclose a *prima facie* case.**

**The Tribunal dismissed the application.**

**On a motion for dismissal for failure to make out a *prima facie* case, a tribunal must decide whether the applicant has made out a case on the face of the written material it has filed as the application. A failure to establish a prima facie case means that even if the applicant could prove all its allegations, the tribunal could do nothing for it. It is not necessary to hear evidence. It is appropriate to examine only the application on such a motion. The Tribunal will look at the effect of the application as a whole; it will not require an applicant to use "technical" or "legal" language. The fact that an application raises a "novel" point will not result in dismissal. The Tribunal must distinguish between those cases in which further particulars are required and those situations in which there is no case at all. It will only dismiss a case without a hearing on the merits when it is "plain and obvious" that a hearing on the merits cannot lead to a result contemplated by the legislation. In this case, the application does not disclose a violation of the Act nor a basis upon which the Tribunal can grant the remedy requested.**

**T.É.S. – Audience – Cas à première vue**

**Pratique et procédure – Rejet sans audience**

**L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui précisait que certaines catégories d'emplois dans son établissement avaient une valeur comparable. L'intimé a présenté une motion pour que la requête soit rejetée parce qu'elle ne divulgait pas une affaire à première vue.**

**Le Tribunal a rejeté la requête.**

**Lorsqu'il étudie une motion concernant le défaut d'établir une affaire à première vue, le Tribunal doit décider si l'auteur de la requête s'est fondé sur les preuves écrites qu'il a déposées comme requête. Le défaut d'établir une affaire à première vue signifie que même si l'auteur de la requête peut prouver toutes ses allégations, le Tribunal ne peut rien faire pour lui. Il n'est pas nécessaire d'entendre les preuves. Il convient seulement d'examiner la requête relative à une telle motion. Le Tribunal étudiera les conséquences de la requête dans son ensemble; il n'exige pas de l'auteur de la requête qu'il utilise des termes «techniques» ou «juridiques». Le fait qu'une requête soulève une «nouvelle» question n'entraîne pas son rejet. Le Tribunal doit établir des distinctions entre les cas où des renseignements supplémentaires sont nécessaires et les cas où il n'existe aucune cause. Il rejettera une affaire sans audience seulement s'il est «évident» qu'une audience sur le bien-fondé de l'affaire ne peut pas donner un des résultats qu'envisage la loi. Dans le cas présent, la requête ne divulgue pas une infraction à la *Loi* et ne constitue pas non plus une raison pour permettre au Tribunal d'accorder le recours demandé.**

## DECISION OF THE TRIBUNAL, MARCH 21, 1991

1. The applicant in this case, the Corporation of the City of Peterborough ("the City"), requested a hearing under subsection 24(6) of the *Pay Equity Act, 1987* ("the Act") with respect to an order of a Review Officer dated September 7, 1990. The order directed the parties "to meet and complete a pay equity plan and its schedule of adjustments consistent with the provisions of the *Pay Equity Act, 1987* and the document negotiated by their joint pay equity committee" (the document referred to was attached to and formed part of the order); it also directed the parties to "implement [the plan] immediately" with adjustments retroactive to January 1, 1990 (the mandatory posting date for this employer).

2. Counsel for the respondent, the Peterborough Professional Fire Fighters' Association – Local 519 ("the Fire Fighters"), argued that the City's application should be dismissed because it did not present a case which could be remedied by the Tribunal (in other words, that the City had not established a *prima facie* case).

3. Counsel for the City takes the position that the Tribunal does not have the authority to dismiss an application solely on the basis of the written material; he argues that he is entitled to call evidence because paragraph 25(1)(b) of the Act provides that the Tribunal "shall hold a hearing . . . if a request for a hearing, as described in subsection 23(4) or 24(6), is received by the Hearings Tribunal". He concedes that if we permitted him to call evidence and the Fire Fighters then moved for a "non-suit" (that is, that there is no case to answer on the basis of the evidence led by the applicant), we would have the authority to dismiss at that stage. In any case, he submits the City has established a *prima facie* case. Alternatively, he maintains that if we decide that the City has not established a *prima facie* case, it should be allowed to amend its application, a request to which counsel for the Fire Fighters objects.

4. We have concluded that the Tribunal has the authority to dismiss an application for failure to present a *prima facie* case. We also conclude that it is appropriate to dismiss this application on that basis. Our reasons for both conclusions follow below.

5. We first examine whether the opportunity to call oral evidence is a necessary component of a "hearing" within the meaning of paragraph 25(1)(b) of the Act, since if it is, we could not dismiss on the basis of the pleadings.

6. On a motion for dismissal on the basis of failure to make out a *prima facie* case, a tribunal must decide whether the applicant has made out a case on the face of the written material filed as the application. For this purpose, the applicant is permitted to make its best case by treating everything it has alleged as if it were true. A failure to establish a *prima facie* case means that even if the applicant could prove all its allegations, the tribunal could do nothing for it because the facts alleged do not constitute a violation of the relevant statute. If the applicant's best case does not provide the basis for a remedy, the application is dismissed; if it would provide a basis for a remedy, however, the assumption of truth is forgotten: the case proceeds to permit the applicant to prove its allegations and the respondent to respond to them.

7. An applicant must make out a set of circumstances which, if proved, the Tribunal can rectify in the manner requested by the applicant. There are times when the applicant may make out a case which could be rectified by the Tribunal, but does not provide sufficient information for the respondent to answer the case fully; then the Tribunal might order the applicant to provide further particulars about the circumstances underlying its claim. But such cases must be distinguished from those in which it is clear on the material filed by the applicant that the Tribunal could not rectify the circumstances set out by the applicant in the manner requested; then there is no point in proceeding: hence the authority to dismiss for failure to establish a *prima facie* case.

8. This motion is analogous to that which may be made under Rule 21.01 of the Ontario *Rules of Civil Procedure* that a pleading be struck out "on the ground that it discloses no reasonable cause of action or defence". The Ontario Court of Appeal succinctly summarised the law under Rule 21.01 in *Trendsetter Developments Ltd.* v. *Ottawa Financial Corporation* (1989) 33 C.P.C. (2d) 16: "[t]he law is well established that [on such a motion], all the facts pleaded in the statement of claim must be deemed to have been proven, and the Court should make the order only in plain and obvious cases which it is satisfied to be beyond doubt".

9. By virtue of its status as a quasi-judicial body, both under the common law and under the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484 ("the SPPA"), the Tribunal must ensure that all the requirements of natural justice are met, generally in what are considered "trial-like" procedures. The entitlement to call evidence in a hearing is reflected in the provisions of the SPPA and natural justice

principles. Indeed, hearings before the Tribunal will normally involve the calling of oral testimony and the production of documentary evidence. But that entitlement or practice is not absolute. Restrictions on the extent and nature of evidence are expressly set out in the SPPA and have developed in the common law. Most obviously, for example, the witness giving the evidence must be competent to do so and the evidence must be relevant to the dispute between the parties. The entitlement and restrictions both respond to the need to balance all parties' needs in a fair hearing.

10. Paragraph 29(2)(c) of the Act provides that the Tribunal "may make rules for the conduct and management of its affairs and for the practice and procedure to be observed in matters before it". This is consistent with subsection 23(1) of the SPPA: "A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes". It is an abuse of process to permit a matter to proceed when it can be plainly and obviously determined before the proceedings begin that the Tribunal cannot give a remedy even when it assumes that it has before it the best case the applicant is able to establish.

11. Counsel's submissions fail to distinguish between "a hearing" and "a hearing on the merits". A hearing on the merits involves a hearing on the actual dispute between the parties. On occasion, however, the Tribunal's ruling on a preliminary objection will dispose of a case so that it does not proceed to a hearing on the merits. While normally the Tribunal will schedule an oral hearing when a request for a hearing is made to the Tribunal under subsection 24(6) of the Act, there may be any number of reasons why the matter is never heard on the merits. To cite one obvious example: a party may object to a Review Officer order on a basis recognized under the Act, but there is an objection that the employer is actually covered by federal legislation, not provincial. If the Tribunal decides that the employer involved is not subject to provincial law because the type of work falls within federal jurisdiction, it will dismiss the case as being outside the Tribunal's jurisdiction. The hearing will not proceed to the merits of whether the objection to the order is valid. An issue such as the Tribunal's jurisdiction will likely require evidence, either in the form of an agreed statement of facts or oral testimony, but it does not necessarily involve a hearing on the merits of the application filed with the Tribunal. By comparison, the issue raised here by definition precludes the calling of oral testimony, but it does involve what is, in effect, for the purposes of the motion only, an agreed statement of facts: that is, the application filed by the City.

12. The facts alleged in the application are, for the purposes of the motion, tantamount to evidence -- or, indeed, are tantamount to findings of fact by the Tribunal. It is as if we heard the evidence and concluded that the City was right. The City cannot be better off than to have all its allegations of fact accepted; what further evidence could it call? Any further evidence would be redundant or would merely serve to assist the City in trying to establish facts additional to those already accepted as true.

13. Under these circumstances, the City is not prejudiced or denied natural justice if the Tribunal refuses to allow it to call evidence. Counsel had full opportunity to make submissions on the motion itself, including full opportunity to explain to the Tribunal how the application makes out a *prima facie* case. He made those submissions at the oral hearing scheduled after the City filed its application requesting a hearing before the Tribunal.

14. We conclude that paragraph 25(1)(b) of the Act does not automatically entitle the applicant to call oral evidence regardless of its relevance and purpose and that the Tribunal is not thereby precluded from dismissing for failure to plead a *prima facie* case. Having concluded that we have the authority to do so, we

now turn to the particular circumstances of this case and explain why it is appropriate to dismiss the City's application on that basis.

15. There was some dispute about the documents which we should examine before making such a determination. Counsel for the City argues we should consider the applicant's reply. But that ignores the significance of the application. The applicant makes out its case in the application: that is the purpose of the application, to tell everyone involved what the nature of the applicant's case is. The response allows the respondent to state its position on the applicant's case and to raise any other issues relevant to the dispute set out by the application. The reply is an opportunity for the applicant to state its position on those matters raised by the response. It is not for the purpose of raising new issues. Indeed, Rule 3.01 of the Tribunal's *Rules of Practice* provides that "[a]ny party may prepare a reply to the facts, events, and issues *which were raised in a response*" (emphasis added). The reply cannot do *more* than the application for the purpose of determining whether the applicant has established a *prima facie* case: one cannot find there a case which has not been made out in the application. Accordingly, it is appropriate to examine the application only on such a motion.

16. The application form (Form 1) relates to Rule 1 of the Tribunal's *Rules of Practice* which sets out the obligation of an applicant to state the case it wishes to make. Rule 1.02 requires a "completed application" to include, among other things:

> 1.02 . . .
>
> b) a general statement of the complaint, the Review Officer order objected to, or the reason for the request for a hearing by the Applicant;
>
> c) a clear and concise statement of the facts, events, and issues which form the basis of the application, but shall not include the evidence intended to prove the facts, events, and issues;
>
> d) the remedy sought by the Applicant;
>
> . . . .

Rule 1.03 then states that "[a] party will not be permitted to raise a fact, event, or issue not set out in the application, response or reply except with leave of the Tribunal".

17. The application form itself reflects and reiterates Rule 1. Section 4 of the form, called "Case Summary", instructs an applicant to "*Describe briefly* the reason for your request for a hearing" (emphasis in original). At the bottom of the space provided a "Note" appears: "You must complete the Particulars (Section 5) of this Application". Section 5, entitled "Particulars", explains what information the applicant must provide and why:

> The Respondent and Other Parties to this Application are entitled to know the facts, events and issues upon which you base your objection or complaint. This should include: what did or did not happen, who was involved, and when and where these events took place. Do not include the evidence intended to prove these facts, events and issues.

There follows another warning about not being able to raise facts, events or issues not set out in the application, unless the Tribunal grants leave to do so. Section 6, the "Remedy" section asks applicants: "How do you wish the *order, decision, or plan* changed? Describe what you wish the Tribunal to order as a result of this Application. Include all monetary and other redress you seek" (emphasis in original). The application form also has space in Section 9 for "Other Statements".

18. Counsel for the City suggested that an applicant appearing before the Tribunal would not know its application would have to establish a *prima facie* case. Even if it were not self-evident to any person invoking the Tribunal's intervention, the Tribunal's rules put the applicant on clear notice that it must

provide a sufficiently clear statement of what it wants the Tribunal to do and why in order to allow the respondent to respond to the case and to show that the case it wishes to make is one that falls within the Act.

19. In determining whether the applicant has made out a *prima facie* case, the Tribunal will look at the effect of the application as a whole. It will not require an applicant to use "technical" or "legal" language, but will look at the *sense* of the language used by the applicant. The fact that an application raises a "novel" point will not result in dismissal. The Tribunal must also distinguish between those cases in which further particulars are required and those situations in which there is no case at all. It will only dismiss a case without a hearing on the merits when it is "plain and obvious" that a hearing on the merits cannot lead to a result contemplated by the legislation.

20. The summary of the case the City wishes to make reads as follows: "The Corporation maintains that the job comparison system used, a ranking system, does not provide a comprehensive evaluation of the positions which would allow for an accurate comparison for pay equity purposes, therefore the comparisons made in this plan are not valid". Similar general comments of dissatisfaction are found in the remedy section and in "Other Statements". Not all "inaccurate" comparisons would constitute a violation of the Act, but none of these references indicates what it is about the evaluation that is lacking. The particulars set out the history of negotiations between the parties. Nowhere do they allege any actual deficiencies in the system or its application which would mean it was inconsistent with the requirements of the Act. Nor do they suggest a reliance on any other aspect of the legislation.

21. Even if all the facts alleged are true, we have no information upon which to conclude that the comparisons ordered by the Review Officer are not consistent with the requirements of the Act. The remedy requested is that we direct the use of "a point and factor system": even if all the facts alleged are true, we would have no basis upon which to order a "point and factor system". In argument, counsel for the City said there "may" be "gender bias" in the comparison system. Even assuming that a hypothetical violation constitutes an allegation of violation (and we do not mean to suggest that a hypothetical violation is sufficient), there is no reference to gender bias in the application, nor are there any facts which would allow us to find gender bias.

22. Simple disagreement with or dislike of an order or a pay equity plan does not warrant a hearing into the merits. The reason for the disagreement must disclose a violation of the Act which the Tribunal has the jurisdiction to remedy. The City's application does not disclose a violation of the Act nor a basis upon which we can grant the remedy requested.

23. Counsel for the City said we should permit the City to amend its application if we find that it has not established a *prima facie* case. As a variation, counsel for the City requested that we allow him to file additional particulars. Counsel for the Fire Fighters argues that we should deny those requests because of what she alleges is delay and a failure to follow Rule 9 of the Tribunal's Rules of Practice. Both submissions miss the point of a finding that no *prima facie* case has been established. Where a *prima facie* case has been established, it might still be necessary to provide additional particulars necessary to allow the respondent to meet the case; and there might be reasons why a tribunal might not permit additional particulars and might strike the deficient portions of the application. But these issues do not arise where there is no case at all.

24. This application is therefore dismissed for failure to establish a *prima facie* case, without prejudice to the City's filing another application.

**0189-91 IN THE MATTER** of a Referral under subsection 24(5) of the *Pay Equity Act, 1987* relating to Carlton Cards Limited and the Canadian Paperworkers Union

**Before:** Beth Symes, Chair and Members Susan Genge and Janet Slone Taylor

**Cite As:** Re Carlton Cards (1991), 2 P.E.R. 91

**Practice and Procedure - Referrals**

A review officer formed the opinion that an Employer was not complying with his order and referred the matter to the Tribunal. Neither the Employer nor the Union had applied to the Tribunal requesting a hearing about the order.

The Tribunal ordered the Registrar to schedule the case for a hearing at which it asked the parties to make submissions on how the Tribunal ought to proceed.

Section 25(1)(c) of the *Act* requires the Tribunal to hold a hearing when it receives a referral from a review officer pursuant to s.24(5). The purpose of a referral hearing is to determine whether a party has failed to comply with the review officer's order. The Tribunal must have evidence at the hearing on which to make such a finding. If the Union is prepared to allege that the Employer has not complied it will be required to complete an application to substantiate its allegation.

**Pratique et procédure - Renvois**

Un agent de révision était d'avis qu'un employeur ne respectait pas son ordre et a saisi le Tribunal de la question. Ni l'employeur ni le syndicat n'avaient demandé au Tribunal de se faire entendre relativement à l'ordre.

Le Tribunal a ordonné au greffier de fixer les date, heure et lieu d'une audience. Au cours de cette audience, il a demandé aux parties de lui présenter des observations sur la façon dont il devrait procéder.

L'alinéa 25 (1) c) de la *Loi* exige que le Tribunal tienne une audience lorsqu'un agent de révision lui renvoie une question aux termes du paragraphe 24 (5). L'objet de cette audience est d'établir si une partie ne s'est pas conformé à l'ordre de l'agent de révision. Lors de l'audience, le Tribunal doit avoir des preuves sur lesquelles il peut se fonder pour arriver à une telle conclusion. Si le syndicat est prêt à alléguer que l'employeur n'a pas respecté l'ordre, il sera tenu de remplir une requête pour établir le bien-fondé de son allégation.

**DECISION OF THE TRIBUNAL, APRIL 12, 1991**

1. On March 7, 1991 the Tribunal received a referral from Gerald Lee, a Review Officer, which stated that Mr. Lee was of the opinion that Carlton Cards Ltd. was not complying with his order dated December 12, 1990. Mr. Lee referred this matter to the Tribunal under section 24(5).

> s.24(5) Where an employer or a bargaining agent fails to comply with an order under this section, a review officer may refer the matter to the Hearings Tribunal.

2. The Review Officer ordered Carlton Cards Limited and the Canadian Paperworkers Union and its Local 322 to negotiate one pay equity plan for all bargaining unit members employed by Carlton Cards Limited in the geographical divisions of the Municipality of Metropolitan Toronto and the Regional Municipality of Peel. The Officer advised the parties that he would continue to monitor the parties' progress.

3. The *Pay Equity Act*[1] provides that where a review officer is of the opinion that a pay equity plan is not being prepared as required by the Act, the review officer may order the employer and the bargaining agent to take such steps as are set out in the order to prepare the plan[2] . The officer made his December order under this provision of the Act.

4. The parties must either comply with the order or dispute the contents of the order.

5. If the employer or bargaining agent named in this order wishes to dispute the contents of the order, they must request a hearing before the Hearings Tribunal with respect to the order[3] . To initiate such a hearing, the party must complete an application requesting the hearing, serve it on the other party, and file

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1 *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended

2 *Pay Equity Act*, supra s.24(1)

3 *Pay Equity Act*, supra s.24(6)

the application together with a statement of service with the Tribunal[4] . To date, neither the employer nor the bargaining agent has requested a hearing about this order.

6. The Tribunal has received a referral from the Review Officer in which the officer states that he is of the opinion that Carlton Cards is not complying with the order. Having received this referral, the Tribunal must hold a hearing as required by section 25(1)(c) of the Act.

> s.25(1) The Hearings Tribunal shall hold a hearing,
> (c) if a review officer refers a matter to the Hearings Tribunal under subsection 24(5).

7. The purpose of a referral hearing is to determine whether a party has failed to comply with the review officer's order. The hearing will not deal with the merits of the order.

8. The Review Officer has formed the opinion that the Employer has not complied with the December 12, 1990 order. Hearings before the Tribunal are de novo[5] . Opinions of a review officer are not evidence. Therefore, the Tribunal must have evidence at the hearing on which to make such a finding.

9. Is the Union prepared to allege that the Employer has not complied with the Review Officer's order of December 12, 1990? If so, the Union will be required to complete an application to substantiate its allegation.

10. The panel therefore requests the Registrar to schedule this case for hearing forthwith. On the first day of hearing, the parties will be asked for their submissions on how the Tribunal ought to proceed.

11. Should a party request a hearing on the merits of the December 12, 1990 order, the Tribunal will list that application for hearing together with the hearing on the Review Officer's referral.

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4 *Rules of Practice* s. 1.01

5 *Cybermedix Health Services Ltd.* (1989), 1 P.E.R. 41 at p. 44, 45

**0048-90 0059-90 0067-90** The Corporation of the City of Barrie, Applicant v. Canadian Union of Public Employees, Local 2380, Respondent and The Barrie Public Library Board, Other Party ; Group of Employees, Applicant v. The Corporation of the City of Barrie, Respondent and Canadian Union of Public Employees, Local 2380, Respondent and The Barrie Public Library Board, Respondent; The Corporation of the City of Barrie, Applicant v. Group of Employees, Respondent and The Barrie Public Library Board, Respondent

**Before:** Mary Ellen Cummings, Vice-Chair and Members Bruce Budd and Donald Dudar

**Appearances:** Joseph Tascona and Mark Potter for The Corporation of the City of Barrie David McKee and Norman MacKenzie for the Canadian Union of Public Employees, Local 2380 Gail Mullen for The Barrie Public Library Board Lynne Jordan for the Group of Employees

**Cite As: Barrie Public Library Board** (1991), 2 P.E.R. 93

**Application of Act - Employer**

**Practice and Procedure - Precedent**

The issue before the Tribunal was whether the Barrie Public Library Board ("the Board") or the Corporation of the City of Barrie ("the City") is the employer of the employees who work at the library.

The Tribunal held that the Board was the employer of the employees at the library.

The purpose of the *Act* is to redress systemic gender discrimination in compensation. The Legislature could have selected any number of ways to redress this discrimination. The decision to implement pay equity using employers and bargaining agents recognizes that there is an element of labour relations and employment law as well as anti-discrimination legislation to the concept of pay equity. The thrust of the *Act* is on reviewing compensation practices and the valuing of work. A full examination of the reality of the employment relationship may be required to determine who really sets compensation policy and attaches value to the work performed. In every case, the focus should be on identifying the entity that controls the compensation practices that the *Act* seeks to redress.

In *Haldimand-Norfolk (No. 3)* (1989), 1 P.E.R. 17, the Tribunal set out four tests which it applied in approaching the question of who is the employer. The fourth test was further developed in subsequent cases. It is now appropriate to continue that evolution and re-examine the application of the other tests. It is appropriate to give greater consideration to the existing bargaining or employment relationships. In the vast majority of cases those relationships will be the ones used for the implementation of pay equity. That approach makes sense for the effective achievement of the goals of the *Act* and best conforms with the scheme of the *Act*. The employers in those relationships will usually be the entities who will be found by the Tribunal to control the compensation practices and the attaching of value to work. The question in the second test of *Haldimand-Norfolk (No. 3)* that asks "what is the labour relations reality, who negotiates the wages and benefits with the union or who sets the wage rate in the non-unionized setting?" should be of paramount consideration. The questions posed in the first two tests are helpful to the extent that they assist in determining which entity holds the responsibility for compensation practices and the valuing of work. The Tribunal used those tests in assessing the evidence. That part of the third test that asks, "who decides what labour is to be undertaken and attaches that responsibility to a particular job" was also helpful, as an indication of which entity is responsible for the valuing of work. The part that refers to identifying whether the activity is a "core" one or is integral to the organization is not very helpful in the public sector. The choice to deliver government services through an agency rather than a government department does not make those services any less essential or integral to the government that chose to provide them. What it does reflect is a choice by government to deliver services through agencies that are to some degree autonomous. Evidence relating to that autonomy is relevant to the Tribunal since it assists in determining who controls compensation policy and who attaches value to the work performed. In the private sector, asking whether the work in dispute is integral to the enterprise may be more helpful but the evidence must be applied cautiously. This part of the test should only be used when it is not clear, having regard to the first two tests, which of the entities controls compensation practices and the attaching of value to work. Employee perception may be useful, but the Tribunal must review the perception or belief to determine whether it was reasonably held. The fourth test should only be applied where the evidence on the other three factors leaves doubt as to which entity is the employer. It is not to be used in the initial weighing of the evidence.

The Board is the employer of the employees working at the library. While the City has a close relationship with the Board, particularly in funding, the Board exercises the ultimate responsibility for its budget, controls its own compensation practices, and attaches the value to the work performed by the staff. It was not necessary for the Tribunal to resort to the third or fourth tests.

**Tribunal Member Bruce Budd Dissented**

The City is the employer whether or not the tests set out in *Haldimand-Norfolk (No. 3)*, or the truncated version adopted by the majority are applied in this case. Three different panels of the Tribunal have unanimously adopted the same test to determine who is the employer. A consistent approach to decision making permits parties to predict the outcome of their disputes, and facilitates negotiation. Although the Tribunal can depart from its previous case law where appropriate, it was not appropriate to do so in this case. The four established tests allowed the Tribunal to balance conflicting points of evidence. The truncated test means this kind of balancing is no longer possible. The *Act* expressly assumes that systemic discrimination exists, which, by definition, may be present in the existing collective bargaining relationship. The collective bargaining employer is to be a starting point for the investigation -- certainly not a paramountcy.

## Pay Equity Process – Comparisons – Vacant Male Job Class

A position previously filled by a single male incumbent had been vacant for several years. Classification of the position and its wage rate continued to be included in the collective agreement. The issue for the Tribunal was whether the job class consisting of the position was available as a comparator.

The Tribunal held that the job class consisting of one vacant position was not an appropriate comparator.

It is not practical for the the parties to undertake the kind of evaluation which the *Act* requires with respect to this job class. This does not mean that a vacant job class can never be used as a comparator. If the job class is eventually filled, it may be appropriate for the Union to file a complaint pursuant to s. 22(2)(b) of the *Act*.

## Champ d'application de la Loi – Employeur

## Pratique et procédure – Précédent

Le Tribunal devait décider si le Conseil des bibliothèques publiques de Barrie («le Conseil») ou la municipalité de la ville de Barrie («la Ville») était l'employeur du personnel de la bibliothèque.

Le Tribunal a statué que le Conseil était l'employeur du personnel de la bibliothèque.

L'objet de la *Loi* est d'éliminer la discrimination systémique entre les sexes en ce qui concerne la rétribution du travail. Le législateur aurait pu choisir d'autres méthodes en vue d'éliminer cette forme de discrimination. La décision de mettre en oeuvre un programme d'équité salariale qui fait intervenir les employeurs et les agents de négociation reconnaît l'existence des éléments suivants au sein du concept d'équité salariale : droit du travail et des relations de travail, et mesures législatives visant à éliminer toute forme de discrimination. L'objet primordial de la *Loi* est de réviser les pratiques de rétribution et les évaluations du travail. Un examen détaillé de la nature des relations de travail peut être nécessaire en vue de déterminer l'entité qui définit véritablement les politiques de rétribution et qui affecte une valeur au travail accompli. Dans chaque cas, il importerait avant tout de déterminer l'entité qui réglemente les pratiques de rétribution que la *Loi* vise à éliminer.

Dans *Haldimand-Norfolk (no 3)* (1989), 1 P.E.R. 17, le Tribunal a exposé quatre critères qu'il a appliqués à la détermination de l'employeur. Le quatrième critère a fait l'objet d'une élaboration plus détaillée dans les causes subséquentes. Il convient, maintenant, de poursuivre cette évolution et de réexaminer le champ d'application des autres critères. Il est également approprié d'étudier de façon plus approfondie les relations de travail actuelles ou les rapports existants en matière de négociation. Dans la grande majorité des cas, ces relations et rapports seront ceux qui serviront à la mise en oeuvre du programme d'équité salariale. Cette méthode favorise la pleine réalisation des buts de la *Loi* et est celle qui se conforme le plus à l'esprit de la *Loi*. Habituellement, le Tribunal conclura, en ce qui concerne ces rapports, que l'employeur est l'entité qui réglemente les pratiques de rétribution et qui affecte une valeur au travail accompli. La question que comporte le deuxième critère énoncé dans *Haldimand-Norfolk (no 3)*, à savoir : «Quelle est la réalité des relations de travail, qui négocie les salaires et les avantages avec le syndicat ou qui fixe le taux de salaire du personnel non syndiqué?» est d'une importance capitale. Les questions qu'énoncent les deux premiers critères sont utiles dans la mesure où elles facilitent l'identification de l'entité responsable des pratiques de rétribution et de l'affectation d'une valeur au travail accompli. Le Tribunal s'est servi de ces critères afin d'évaluer la preuve qui lui a été fournie. La partie suivante du troisième critère : «Qui détermine les tâches qui doivent être exécutées et qui affecte cette responsabilité à un emploi donné» a également été utile, car elle a servi à définir l'identité de l'entité responsable de l'affectation d'une valeur au travail. La partie qui consiste à déterminer si l'activité en question constitue une activité centrale ou fait partie intégrante de l'organisme n'est pas très utile dans le secteur public. La décision de fournir des services gouvernementaux par l'intermédiaire d'un organisme plutôt que par l'entremise d'un ministère n'influe d'aucune façon sur le caractère essentiel ou intégral de ces services aux yeux du gouvernement qui a choisi de les fournir. Ce choix reflète plutôt la volonté politique du gouvernement de fournir des services par l'intermédiaire d'organismes dotés d'un certain degré d'autonomie. Les preuves liées à cette autonomie sont pertinentes, car elles aident le Tribunal à définir l'entité qui réglemente les pratiques de rétribution et qui affecte une valeur au travail accompli. Dans le secteur privé, la question de savoir si le travail qui constitue l'objet du litige fait partie intégrante de l'entreprise peut se révéler plus utile, mais les preuves doivent être étudiées avec circonspection. Cette partie du critère ne devrait être employée que lorsqu'on ne sait pas, de façon claire, d'après les deux premiers critères, laquelle des entités réglemente les pratiques de rétribution et affecte une valeur au travail accompli. L'opinion des employés peut être utile, mais le Tribunal doit s'assurer que cette opinion est fondée sur des motifs raisonnables. Le quatrième critère ne devrait être employé que lorsque les preuves découlant des trois autres critères laissent encore planer un doute sur l'identité de l'employeur. Il ne doit pas servir à l'appréciation initiale de la preuve.

Le Conseil est l'employeur du personnel de la bibliothèque. Même si la Ville entretient des rapports étroits avec le Conseil, particulièrement en ce qui concerne le financement, le Conseil assume la responsabilité finale du budget, réglemente ses propres pratiques de rétribution et affecte une valeur au travail du personnel. Le Tribunal n'a pas eu besoin d'avoir recours aux troisième et quatrième critères.

## Dissentiment de Bruce Budd, membre du Tribunal

La Ville est l'employeur du personnel des bibliothèques, qu'on applique ou non à la présente affaire les critères exposés dans *Haldimand-Norfolk (no 3)* ou dans la version tronquée adoptée par la majorité des membres. Trois comités différents du Tribunal ont unanimement adopté le même critère afin de déterminer l'identité de l'employeur. Un processus décisionnel uniforme permet aux parties de prédire l'issue de leur litige et facilite les négociations. Même si le Tribunal peut s'écarter, lorsque cela est approprié du droit jurisprudentiel établi antérieurement, cela n'est pas opportun dans la présente affaire. Les quatre critères qui ont été mis au point ont permis au Tribunal de mettre en équilibre des éléments de preuve contradictoires. L'emploi du critère tronqué signifie que ce genre d'harmonisation n'est plus possible. La *Loi* suppose expressément qu'une forme de discrimination systémique existe qui, par définition, peut se retrouver dans le système actuel de négociation collective. L'employeur, aux fins de la négociation collective, constitue le point de départ de cette enquête, mais n'en est certainement pas l'élément capital.

**Processus d'équité salariale – Comparaisons – Catégorie d'emplois à prédominance masculine vacante**

**Un poste qu'occupait auparavant un seul titulaire masculin était vacant depuis plusieurs années. La classification de ce poste et l'échelle de salaires qui s'y rapporte continuaient de figurer dans la convention collective. Le Tribunal devait décider si la catégorie d'emplois qui comprenait ce poste pouvait servir à des fins de comparaison.**

**Le Tribunal a statué que la catégorie d'emplois qui comprenait un poste vacant ne pouvait pas convenablement servir à des fins de comparaison.**

**Il n'est pas pratique que les parties procèdent aux évaluations que la *Loi* exige en ce qui concerne cette catégorie d'emplois. Cela ne veut pas dire qu'une catégorie d'emplois se composant de postes vacants ne peut jamais servir à des fins de comparaison. S'il y a un jour un titulaire dans cette catégorie d'emplois, le syndicat voudra peut-être déposer une plainte conformément à l'alinéa 22 (2) (b) de la *Loi*.**

## DECISION OF THE TRIBUNAL, APRIL 30, 1991

1. There are two issues in this case:

- Who is the employer of the employees who work at the Barrie Public Library?
- Is the position of Custodian 1 a potential male job class for comparison?

2. There were originally four applications to the Tribunal involving these parties (Tribunal files #0047-89, #0048-90, #0059-90 and #0067-90). Two were withdrawn (#0047-90 and #0059-90). The panel then was left with the questions of who is the employer of the bargaining unit employees represented by the Canadian Union of Public Employees, Local 2380 ("CUPE") and whether the Custodian 1 position is a potential comparator (#0048-90), together with the question of who is the employer of the non-bargaining unit employees (#0067-90). The parties agreed that it was appropriate to hear the two matters together because they involved common questions of fact and law.

3. The Corporation of the City of Barrie (the "City") argued that The Barrie Public Library Board (the "Library Board") is the employer and that the Custodian 1 position is a potential male job class comparator. CUPE, the Library Board and a group of non-bargaining unit employees (the "Group of Employees") argued that the employer is the City and that the Custodian 1 position is not a potential comparator.

## WHO IS THE THE EMPLOYER?

### The Facts

4. The Library Board is an independent board established under the *Public Libraries Act, 1984*, S.O. 1984, c.57. The Board is composed of members whose appointment is made by the City. Some of the appointments are recommended by the public and separate school boards in the Barrie area, who advertise for applicants. In addition, the City appoints one of its aldermen to the Library Board.

5. The Library Board holds regular meetings and has numerous committees who do the work of the Library Board in finance, personnel, labour negotiations and other matters. They then report to the Library Board. The Library Director reports to the Library Board and is its Chief Executive Officer.

6. Approximately 80% of the Library Board's operating budget comes from the City in the form of an operating grant. The rest of the budget comes from revenue from fines and fees, grants from the Province of Ontario and from a contract with Oro Township under which the Library Board provides library services for Township citizens. The City owns the buildings where the Library is located and no rent is paid.

7. There is a close relationship between the City and the Library Board. Much of the evidence in the case went to the nature of that relationship.

8. After preparing its operating budget, the Library Board presents its grant request to the City Council's General Committee. Over the years, there have been occasions when the City has not granted the whole of the Library Board's request. In one year, for example, the Library Board was asked to reduce its request by 1% and it did so. In most years, though, the City granted the Library Board's request. That happens, we find, because the Library Director, with the Finance Committee and the Board, works to formulate a grant request that the City will approve. We heard evidence that the Library Director consults with the City Treasurer about the guideline for budget increases that City Council prepares for the use of City Departments. While the Library Board may not be bound by those guidelines, the Library Board uses them in preparing its grant request to the City. The guideline also plays a role in collective bargaining between CUPE and the Library Board, in that both sides are often aware of the guideline.

9. The closeness of the relationship is shown in other ways. The City performs the payroll function for the Library, without charge. Members of the Library staff sit on informal committees of the City. The City's Director of Personnel has acted as spokesperson on the Library Board's negotiating committee and has participated in grievance settlements. He has in fact even signed memoranda of agreement, along with the Library Director and members of the Board, and the collective agreement has been prepared in his office. The involvement of the Director of Personnel and his predecessor has occurred for a number of years.

10. The Library Director and other members of her staff have regular contact with the administrative staff of the City on a variety of issues. We also heard evidence that there is inconsistency in whether the Library is seen by the City and citizens as part of the City of Barrie. For example, Library staff have received long service awards from the Mayor; Records of Employment for some Library staff, which are prepared by the City as part of the payroll function, have indicated that the City is the employer and information literature has in some cases listed the Library as part of the City. On the other hand, the Annual Report prepared for City Council by the City's Director of Personnel on the activities of the Personnel Department makes no mention of staff who work at the Library. The question that remains however, is whether there is an employment relationship, for the purposes of the *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended, (the *"Act"*) between the City and the employees who work at the Library?

**The Law**

11. The purpose of the *Act* as set out in the preamble and in section 4, is to redress systemic gender discrimination in job classes that are female dominated. The Tribunal, in *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R. 17 at paragraphs 41 and 42 sets out the purpose and framework of the *Act:*

> The preamble of the *Pay Equity Act, 1987* reflects this historical wage inequity and the need to take pro-active steps to address it. The preamble states that "whereas it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes in Ontario;" this Act has been enacted. The preamble along with the purpose of the Act outlines the nature of the discrimination the legislation is intended to address through the affirmative action of employers. The purpose of the *Pay Equity Act, 1987* is found in section 4...
>
> The law also has a labour relations component in that the framework for achieving pay equity in unionised workplaces is a collective bargaining one, with both rights and obligations on employers and bargaining agents. The Act imposes the obligation to negotiate pay equity plans and provides a detailed mechanism by which pay equity may be achieved. The law gives clear recognition to the history and structure of collective

> bargaining in this province. It is however, unlike other collective bargaining statutes in that it has an interest in the content and process of pay equity negotiations in order to ensure that affirmative action is taken to redress wage discrimination. We do not accept the submissions of Counsel that the statute is merely a collective bargaining statute; not only because of its anti-discriminatory nature, but because there are approximately 79% of women in the Ontario workforce who are not afforded the protections of a collective agreement. The Act covers these non-unionised women in workplaces of more than 10 employees through a very different implementation and complaint mechanism. It is a statute having the specific purpose of redressing wage discrimination with elements of both human rights and labour relations law.

12. Presumably, the Legislature could have selected any number of ways to address gender discrimination in compensation. It could have raised the minimum wage. It could have provided for pay equity within particular industries. Instead, it chose to do so by requiring employers and bargaining agents, where they exist, to review compensation practices in each "establishment" of the employer and remedy pay inequities attributable to gender discrimination. The decision to implement pay equity using employers and bargaining agents recognises that there is an element of labour relations and employment law as well as anti-discrimination legislation to the concept of pay equity.

13. Given that framework, it is for the Tribunal to identify who are the bargaining agent and employer where either is in dispute. In section 1(1), the *Act* defines "bargaining agent" as a trade union that under the *Labour Relations Act*, R.S.O. 1980, c.228, as amended, or other legislation has the status of exclusive bargaining agent: the entity that bargains collective agreements on behalf of employees under other legislation will also bargain pay equity.

14. While the *Act* provides no similar definition of "employer", there are indications that the Legislature intended it to be interpreted in a manner that recognised already existing relationships between employers and employees and between employers and bargaining agents. A review of subsection 8(2), for example, indicates that the Legislature foresees differences in compensation between male and female job classes after pay equity is achieved "...if the employer is able to show that the difference is the result of differences in bargaining strength." This section contemplates a congruence between the entity that bargains wages with employees, either collectively or individually, and the entity with obligations under the *Act*. The provisions in subsection 9(2) which prohibit an employer from intimidating or penalising persons who seek to exercise their rights under the *Act* contemplate that the employer who is in a position to penalise or discriminate is the same employer who has obligations under the *Act*.

15. A framework that takes account of pre-existing structures recognises that remedying pay inequities will affect the existing wages and benefits and cannot readily be divorced from other negotiations and decisions about them. In fact, section 13 of the *Act* provides that pay equity adjustments to rates of compensation form part of the collective agreement. The recognition of existing structures also permits employers, and bargaining agents where they exist, some flexibility in how they achieve pay equity. It accepts that pay equity obligations can be met in different ways in different workplaces. The scheme of the *Act* encourages parties to work out whatever is most suitable, yet consistent with the legislation. The *Act* contemplates a self-managed process to meet the goals of pay equity. Resort to the Tribunal is available where there are disagreements about the appropriate ways to meet those goals, but it was not the intention that the Tribunal would become involved in every pay equity plan in the Province.

16. Most fundamentally, implementation of pay equity within the framework of existing bargaining and employment relationships recognises that to establish and maintain pay equity will inevitably alter the workplace in many areas. An evaluation of male and female dominated job classes may change existing hierarchies as previously under-valued female jobs are fully recognised both monetarily and otherwise. Pay grids and merit compensation schemes will change as will collective bargaining. The obligation in section 7 is not just to establish pay equity but to maintain it. Therefore, changes to compensation practices and the valuing of work will continue. Since the parties to the existing collective bargaining and employment relationships will be profoundly affected by these changes, it makes sense for the Tribunal to commence its enquiry by identifying the parties to those relationships.

17. Allowing the parties in existing structures to meet the obligations of the *Act* is least disruptive to the workplace and is consistent with the framework of the *Act*.

18. However, the decision not to define "employer" in the *Act* recognises that the Tribunal may have to look beyond those existing structures to define "employer". Further, there may be situations where it is difficult to identify, with any certainty, the parties to the existing relationship. This may occur particularly in the non-union sector where it has never been necessary for the parties to turn their minds to the question of which entity is the employer.

19. What evidence is relevant then to the Tribunal's enquiry? The *Act* focuses on the compensation practices within the employer's establishment. Section 7 of the *Act* requires every employer to "establish and maintain compensation practices that provide for pay equity". The *Act* then outlines how existing compensation practices are to be reviewed and how pay inequities are to be remedied. The thrust of the *Act*, then, is on reviewing compensation practices and the valuing of work. The Tribunal's enquiry, therefore, should centre on identifying the entity that is responsible for existing compensation practices and the valuing of work. The reason is purely practical; the entity that established the existing compensation practices at some point made some decisions about the value of work in that workplace. That entity, therefore is in the best position to review those practices, as the *Act* requires, and remedy gender inequities to establish pay equity.

20. A full examination of the reality of the employment relationship may be required to determine who really sets compensation policy and attaches value to the work performed. There may well be cases where the named employer to the collective agreement is not the entity that sets compensation policy and assigns value to the work to be performed. Similarly, there may be cases where the entity that signs the pay cheques and hires and fires non-union employees and has other employment obligations does not set the compensation practices and attach value to work.

21. But in every case, the focus should be on identifying the entity that controls the compensation practices that the *Act* seeks to redress. In few cases will that be an entity other than the one responsible for other employment obligations.

22. The Tribunal in *Haldimand–Norfolk (No.3)*, at paragraph 51, set out four tests which it applied in approaching the question of who is the employer:

> 1. WHO HAS OVERALL FINANCIAL RESPONSIBILITY?
>
> Indicia of this test include: Who has responsibility for the budget? Who bears the financial burden of compensation practices, and the burden of wage adjustments under the *Act*? Who is responsible for the financial administration of the budget? What is the shareholder investment or ownership? Who bears the responsibility of picking up the deficit or benefiting from the surplus?
>
> 2. WHO HAS RESPONSIBILITY FOR COMPENSATION PRACTICES?
>
> The indicia for this tests include: Who sets the overall policy for compensation practices? Who attaches the value of a job to its skill, effort, responsibility and working conditions? What is the labour relations reality, who negotiates the wages and benefits with the union or sets the wage rate in a non–unionised setting?
>
> 3. WHAT IS THE NATURE OF THE BUSINESS, THE SERVICE OR THE ENTERPRISE?
>
> Within this test, the following are helpful indicia: What is the core activity of the business, service or enterprise? Is the work in dispute integral to the organisation or is it severable or dispensable? Who decides what labour is to be undertaken and attaches that responsibility to a particular job? What are the employees perceptions of who is the employer?
>
> 4. WHAT IS MOST CONSISTENT WITH ACHIEVING THE PURPOSE OF THE PAY EQUITY ACT?
>
> If there is more than one possible employer, it assists the Tribunal in its determination to make reference to the purpose and objectives of the *Pay Equity Act, 1987*.

23. When it introduced those tests, the Tribunal said:

> We do not intend these tests to be all encompassing. As with any new statute, interpretation must be approached in an incremental fashion, having regard to the possibility that future cases may add to those tests.

Since the *Haldimand–Norfolk (No.3)* decision, we have seen further development in the tests. The *Middlesex and London* case (1989), 1 P.E.R. 89 and the *Metropolitan Toronto Library Board* case (1989), 1 P.E.R. 112 provided further guidance as to how the fourth test should be applied. It is now appropriate to continue that evolution and re–examine the application of the other tests.

24. As already stated, we believe that it is appropriate to give greater consideration to the existing bargaining or employment relationship. In *Middlesex and London*, the panel stated at paragraph 115:

> In our view, the fact that a bargaining agent has recognised a party as the employer of its members [for collective bargaining] is of persuasive value. It is not determinative of the issue of employer in all cases, however.

25. We go further. In the vast majority of cases, the existing collective bargaining or employment relationships will be the ones used for the implementation of pay equity. Not only does that make sense for the effective achievement of the goals of the *Act*, it is the approach that best conforms with the scheme of the *Act*. Furthermore, the employers in those relationships will usually be the entities who will be found by the Tribunal to control the compensation practices and the attaching of value to work.

26. Therefore, the question in the second test of *Haldimand–Norfolk (No.3)*, that asks "what is the labour relations reality, who negotiates the wages and benefits with the union or who sets the wage rate in the non–unionised setting?" should be of paramount consideration.

27. The questions posed in the first two tests in *Haldimand-Norfolk (No.3)* are helpful to the extent that they assist in determining which entity holds the responsibility for compensation practices and the valuing of work. The questions posed in the first test may indicate which entity has indirect control over compensation practices and the valuing of work. The questions in the second test look at more direct control. We used those tests in assessing the evidence led.

28. That part of the third test that asks, "who decides what labour is to be undertaken and attaches that responsibility to a particular job" was also helpful to us, as an indication of which entity is responsible for the valuing of work. However, the part that refers to identifying whether the activity is a "core" one is or integral to the organisation is not, in our opinion, very helpful in the public sector. There will always be some links between various levels of government and agencies such as a library board. We have seen in cases such as *Middlesex and London* and *Metropolitan Toronto Library Board*, that virtually all of the funding for the operation of the agencies comes from one or more level of government. This is hardly surprising; those agencies deliver services that government has determined should be provided to citizens through the use of tax money. The choice to deliver those services through an agency rather than a government department does not make those services any less essential or integral to the government or governments that choose to provide them. What it does reflect, however, is a choice by government to deliver those services through agencies that are to some degree autonomous from government. Evidence relating to that autonomy is relevant to the Tribunal since it assists in determining who controls compensation policy and who attaches value to the work performed.

29. In the private sector, asking whether the work in dispute is integral to the enterprise, may be more helpful but the evidence must be applied cautiously. One can envision an entity arguing that where it has two operations that are distinct in the services they provide or enterprises in which they engage, two "establishments" should be found, notwithstanding that the compensation practices and the attaching of value to work are controlled by one entity. In such a case, the Tribunal should still find that the enterprises constitute one employer for the purposes of the *Act* because it is only one entity that has been responsible for the existing compensation practices and so, has the obligation for reviewing them and remedying any inequities. That part of the third test then, should only be used when it is not clear, having regard to the first two tests, which of the entities controls compensation practices and the attaching of value to work.

30. With respect to the question of employee perception, we heard no useful evidence about who the employees at the Library Board perceive to be their employer for the purposes of pay equity. While in another case, employee perceptions may be useful, we echo the caveat in *Middlesex and London* at paragraph 90 which said that "... the Tribunal must review the perception or belief to determine, whether, on the evidence, it was reasonable for an employee to believe that a party was in fact his or her employer."

31. In considering the fourth test, we adopt the comments of the panel in the *Middlesex and London* case at paragraph 111:

> ...where the evidence points inescapably to the conclusion that one party is the employer, it would be inappropriate to make a finding inconsistent with the evidence simply on the basis that to do otherwise would deprive female job classes of male comparators in a particular workplace.

32. The fourth test, therefore will only be applied where the evidence on the other three factors leaves doubt as to which entity is the employer. It is not to be used in the initial weighing of the evidence.

33. What we have set out, therefore, is a scheme for applying the tests set out in *Haldimand–Norfolk (No.3)* within the framework of the legislation. The Tribunal should start with a identifying, where possible, the parties to the existing collective bargaining or employment relationship. The Tribunal must then determine if the employer in that relationship controls the compensation practices and the valuing of work. The first two tests and the first part of the third test set out by the Tribunal in *Haldimand–Norfolk (No.3)* will elicit evidence upon which the Tribunal can determine, in the vast majority of cases, who is the "employer" for the purposes of the *Act*. The part of the third test that asks whether the work at issue is integral to the enterprise may be of some further assistance in the private sector, and the fourth test may be resorted to if the answer is still unclear.

## THE DECISION

34. CUPE and the Library Board argued that the evidence demonstrates that the City controls the activities of the Library Board to such an extent that the City should be considered the employer of the employees who work at the Library Board for the purposes of pay equity. The Library Director acknowledged that for other employment purposes the Library Board is the employer. The Library Board is the party to the collective agreement with the Union. The Library Board sets the compensation for non–union staff. The Library Board through the Library Director directs the allocation of work on a day to day basis, evaluates staff, and hires and fires. The Library Board has its own personnel policy manual which it administers.

35. CUPE also argued that the involvement of the City's Director of Personnel in the labour relations of the Library Board manifested the City's control. While there is no doubt that the Library Director has called on the City's Director of Personnel for advice over a number of years, we are not convinced that he acted in a manner that served the interests of the City. No evidence was led to suggest that the advice and counsel he gave was in the interests of the City and we are not prepared to make such an inference merely from his involvement. He possessed skills that the Library Board found useful and he used those skills in the interests of the Library Board.

36. We found of particular significance the evidence that the Library Board determines the compensation practices of the Library, and the Library Board through the Library Director attaches value to the work performed by the Library staff. CUPE argued, however, that the City's responsibility to provide the bulk of the the Library Board's operating budget placed the City in a position to be more than a paymaster. It argued that the City's ability to withhold, reduce or grant the Library Board's request for funds gave the City effective control over the Library's compensation practices. We disagree. The Library Board has the ability to set its compensation practices within the financial realities. For example, when the City asked the Library Board to reduce its grant request by 1%, it did so, but it did not reduce its operating budget by 1%. Instead it found revenue elsewhere to cover part of the shortfall. It then determined what items would be cut from its budget. The City did not determine the Library's total operating budget. The Library Board set its own priorities within the financial reality of the City's reduction of 1% from its grant request. Further, it is the Library Board that administers its operating budget, not the City. Therefore, it is the

Library Board rather than the City that is responsible for the Library's budget. We are not satisfied that the City even indirectly controls the compensation practices of the Library Board.

37. There is no evidence that the City has ever involved itself in the evaluation of jobs performed by Library staff nor has it ever directly determined what wages and benefits are to be paid to which job. They are determined by the Library Director, on behalf of the Library Board, and through collective bargaining between the Library Board and CUPE. In short, the City has never had any responsibility for the compensation practices in place at the Library. They are set by the Library Board.

38. We conclude that the Library Board is the employer of the employees working at the Library. While the City has a close relationship with the Library Board, particularly in funding, the Library Board exercises the ultimate responsibility for its budget. Most important, the Library Board controls its own compensation practices and attaches the value to the work performed by its staff. Therefore, the responsibility to address gender discrimination in compensation practices, if it exists, should also be the responsibility of the Library Board.

39. It was not necessary for us to resort to the third test, as set out in *Haldimand–Norfolk (No.3)*, to reach this decision. We note, however, that a reading of both the *Public Libraries Act, 1984* and a review of the evidence in this case reveal that the Library Board enjoys significant autonomy from its chief government founder, the City. Section 3 of the *Public Libraries Act, 1984* provides that "a public library shall be under the management and control of a board" and subsection 15(1) states that "a board may appoint and remove such officers and servants as it considers necessary, determine the terms of their employment, fix their remuneration and prescribe their duties." The evidence confirms that the Library Board exercises these powers. That the Library Board took a position on the question of the employer in these proceedings that was contrary to the position taken by the City is also evidence that the Library Board enjoys significant autonomy.

40. Since the evidence clearly points to the Library Board as employer, it was unnecessary to apply the fourth test.

41. In another case, we may be convinced that someone other than the entity that signed the collective agreement and holds other employment obligations has such profound involvement in the compensation practices and the attaching of value to work that it must be found to be the employer for the purposes of the *Act*. That appears to be, at least in part, the basis of the Tribunal's decision in *Metropolitan Toronto Library Board*. We are not, however, persuaded in this case that the closeness of the relationship between the City and the Library Board meant that the City controlled the Library Board's compensation practices and the valuing of work.

42. The Orders of the Review Officers dated October 30, 1989 and March 19, 1990 are varied. The Barrie Public Library Board is the employer of the the employees who work at the Barrie Public Library.

## IS THE POSITION OF CUSTODIAN 1, A POTENTIAL MALE JOB CLASS COMPARATOR?

43. Prior to November of 1983, the position of Custodian 1 was filled by a single male incumbent. Since that date the position has not been filled and the Library Board has contracted with a janitorial firm to perform cleaning services, including the work that was performed by the Custodian 1 position. The Custodian 1 classification has continued to be in the collective agreement with a wage rate.

44. The previous incumbent resigned on the same day that the present Library Director was hired. The Library Director gave evidence that it would be difficult for her to evaluate the skill, effort, responsibility and working conditions of the job class because the job was never performed during her tenure. It appears that no one else is in any better position to evaluate the job. The most recent job description was revised in 1982 and does not, in our view, contain enough information to enable anyone to determine the skill, effort and responsibility required of the job or the working conditions under which it is normally performed.

45. In the circumstances of this case, it is simply not practical for the Library Board and the Union to undertake the kind of evaluation that the the *Act* requires with respect to this job class. This does not mean that a vacant job class can never be used as a comparator. But in this instance we find that the job class of Custodian 1 is not available as a potential male comparator.

46. If the job class is eventually filled, it may be appropriate for the Union to file a complaint pursuant to section 22(2)(b) of the *Act*.

47. We confirm that part of the Order of the Review Officer dated October 30, 1989 which found that the Custodian 1 job class is not an appropriate comparator.

## DECISION OF TRIBUNAL MEMBER BRUCE BUDD, APRIL 30, 1991

1. I dissent from the majority. Not only do the facts in this case support a different outcome, but the unnecessary and unrequested change of the Tribunal's established tests will create confusion and uncertainty in the community. I find the City to be the employer whether the tests set out in *Haldimand-Norfolk (No.3)*, or the truncated version adopted by the majority, are applied in this case. I concur with the majority's finding with respect to the Custodian 1 position.

### Consistency in Decision-making

2. Three different panels of the Tribunal have unanimously adopted the same tests to determine who is the employer. One of the previous cases, *Metropolitan Toronto Library Board*, is even in the same sector as this one. As stated by that panel, "Employers, employees and trade unions are entitled to uniformity and certainty in the interpretation and the application of this statute". This decision is out of step. It undermines rather than promotes consistency in decision-making. A consistent approach to decision-making permits parties to predict the outcome of their disputes. This predictability in turn allows the parties to negotiate in the least costly manner and with the potential for highly consensual results.

3. Although the Tribunal can depart from its previous case law where appropriate, I do not think it appropriate in this case. The discretion that is afforded an administrative tribunal in its decision-making must always be balanced against the need for consistency required by the constituency it serves. The parties argued this case based on the established tests and were never advised that this panel was contemplating such a significant change in the jurisprudence. As well, many library boards across the province already have agreements based on the three consistent rulings. This decision sows confusion - for employers and bargaining agents, and for Review Services. If confusion reigns in the community and at Review Services, the result will be an increased number of disputes, more, not less, involvement by the Tribunal, considerable added costs to all parties and unfairness to Ontario working women.

**Truncating the Tests**

4. The four established tests are multifaceted in nature, grouping thirteen indicators which allow the Tribunal to balance conflicting points of evidence. However, the majority has turned that normal balancing procedure upside-down. It gives paramountcy to one indicator, "what is the labour relations reality, who negotiates the wages and benefits with the union or sets the wage rate in a non-unionised setting", over all others. Adopting this as a paramount test makes the previous kind of balancing of evidence no longer possible.

5. After giving predominance to this one indicator, the majority interprets the term "labour relations reality" in the context of the existing collective bargaining relationship. While it is a given that most parties doing pay equity will find the employer to be the same as in the existing collective bargaining relationship, it is also true that the only cases that come to the Tribunal are the exceptions. The Tribunal in *Middlesex and London* specifically stated that, while the existing employer for collective bargaining purposes is persuasive, it is not determinative. The *Act* expressly assumes that systemic discrimination exists which, by definition, may be present in the EXISTING collective bargaining relationship. The collective bargaining employer was to be a starting point for the investigation – certainly not a paramountcy.

**The Fact Situation**

6. The following facts lead me to conclude that the City is the employer:

- the Library was created by the City which appoints all the Board members,
- all sectors of the Barrie Library community, its Director, the Board, the non-unionized employees and the union, those best able to know the real situation, took the same position that the City is the employer,
- Library staff sit on City committees and receive long service pins from the City,
- the Library uses a City building rent free with no lease,
- the City decides the timing of and approves the capital budget for any new library building,
- the City sets budget guidelines which are always followed by the Library Board in preparing its budget,
- the Library budget goes every year to City Council as part of the approval process of the Library's grant request,
- the City can and has requested the same budget cuts of the Library as it requests of City departments,
- the City provides 80% of the funding to the Library which would not exist without it,
- since 1985, the City prepares the Library's payroll free of charge and issues cheques, T4's and separation slips for Library employees in the City's name,
- City guidelines are used in Library bargaining which is conducted after the City negotiations,
- when a Library salary agreement exceeded the City's, it was presented first to the City for approval before ratification by the Library's board, and
- the City's Director of Personnel, who negotiates all the City agreements, has been involved in Library collective bargaining since its inception and in all its grievance arbitrations.

7. Let us now examine the majority's treatment of this last point in more detail. The evidence reveals an ongoing, uninterrupted, direct participation on the Library Board's negotiating team by the City's

Director of Personnel with increasing responsibilities culminating in chairing the management team, signing the memorandum of settlement, and preparing and signing the collective agreement. Was he negotiating for the Library on his own time? No, he continued to be paid by the City. Was this involvement a personal favour to the Library Director? Nothing led in evidence or even alluded to would allow us to draw such a conclusion. Was it then the result of an inexperienced Library Director requesting the assistance? No, the practice started before the current Library Director assumed her functions. Then, was this a service that the City, being a large employer, offered to other firms in the area? No, it appears that only the Library Board was treated this way. Nevertheless, the majority finds that "we are not convinced that he [the Director of Personnel] acted in a manner that served the interests of the City". Was it not in the City's interest to have its Director of Personnel lead all collective bargaining that impacted on the City's budget? Was it not in the City's interest to have the Library's wage negotiations conducted after those of the other City bargaining units and thereby control the outcome to avoid breaking any pattern already set. The legislation does not require a "smoking gun" to reveal the true pay equity employer as this majority decision would lead us to believe.

## CONCLUSION

8. The majority decision reduces a multifaceted investigative procedure capable of capturing, assessing and balancing various aspects of an employer–employee relationship to what is almost a single factor test. What the truncated test gains in simplicity, it loses in sensitivity. It gives more importance to maintaining the existing collective bargaining relationship than accomplishing the anti–discrimination purpose of the *Act*. It will cause confusion in the entire pay equity community and does a disservice to the women at the Barrie Public Library. For these reasons, it was not appropriate to change the tests at this time and the established tests should have been applied. Ultimately, however, no matter which tests are used, my conclusion remains the same: I find the Corporation of the City of Barrie to be the employer.

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**0001–89** Ontario Nurses' Association, Applicant v. Regional Municipality of Haldimand–Norfolk, Respondent

**Before:** Janis Sarra, Vice–Chair and Members Sharon Laing and Geri Sheedy

**Appearances:** Mary Cornish for the Applicant, Ontario Nurses' Association; Paul Wearing for the Respondent, Regional Municipality of Haldimand–Norfolk.

**Cite As: Haldimand–Norfolk (No. 6) (1991) 2 P.E.R. 105**

**Pay Equity Process – Gender Neutral Comparison System – Elements**

**The Applicant alleged that the point factor job evaluation system proposed by the Respondent was not gender neutral because it did not systematically identify and redress systemic discrimination in nurses' wages. In particular, it was alleged that the system failed to systematically, comprehensively and accurately describe, measure and value the job content of the work performed by the nurses in the bargaining units represented by the Applicant.**

**The Tribunal held that the system was not gender neutral.**

**In order for a comparison system to be gender neutral, it must be able to analyze and rectify systemic patterns of wage discrimination. Particular attention must be paid in valuing the work of female job classes to ensure the comparison system remedies the historical undervaluation of women's work.**

**Although a gender neutral comparison system may involve a formalized job evaluation system, it need not necessarily do so, since the *Act* requires parties to use a gender neutral comparison system but makes no specific reference to job evaluation.**

**There are four component parts to a gender neutral comparison system: (1) the accurate collection of job information; (2) deciding on the mechanism or tool to determine how the value will attach to the job information; (3) applying the mechanism to determine the value of the work performed; and (4) making the comparisons. In negotiating the system parties have the flexibility to fashion a comparison system to meet their needs. As a starting point, they are required to ensure that each component which forms part of the comparison system is gender neutral. Bias in one means the system as a whole is not gender neutral. Gender bias must be eliminated from all parts of the comparison system.**

The skill, effort, responsibility and working conditions normally required in the work of the female and male job classes to be compared must be accurately and completely recorded and valued. In assessing the gender neutrality of the comparison system's collection of job information, the Tribunal considered the following:

(a) the range of work performed in the establishment;

(b) whether the system made work, particularly women's work, visible in the workplace;

(c) whether the information collected accurately captured the skill, effort and responsibility normally required in the performance of the work and the conditions under which it is normally performed for both the female job classes in the plan and the male job classes to be used for comparison; and

(d) whether the job information was being collected accurately and consistently for each job class to be compared.

Whatever comparison system is proposed, consideration must be given to the establishment to which it will be applied. This requires looking to the nature of the organization, the services it provides or the products it produces. The system must specifically address the range of work performed by female job classes.

Given that most women and men perform different jobs, with different skills and job content characteristics, one of the initial and key requirements of a gender neutral comparison system is to make visible those job characteristics, using the statutory criteria, that were previously not visible and thus not valued. Whatever collection method is used, parties must assess whether the answers given will collect information on the actual work required, and will not just be a function of the way men and women describe their work. The Respondent's comparison system, and the job data questionnaire in particular, does not make visible the work of the nurse job classes in the establishment.

Once the comparison system has met the initial requirement to accurately collect the skill, effort, responsibility and working conditions requirements of the job classes to be compared, the comparison system must be applied in a consistent way. Consistency is a necessary but not a sufficient requirement of gender neutrality. Consistently applying a system which does not accurately collect job requirement and which is not gender neutral will not achieve gender neutrality. Further, a consistently applied comparison system which leads to some wage increases to female job classes, does not in itself confirm for parties that the system is gender neutral.

The mechanism or tool to value the work is a complex component of the gender neutral comparison system. Its selection must be negotiated as part of the system. The following considerations are helpful in determining whether the valuation tool is gender neutral: can the tool determine the value of the work performed using the statutory criteria of skill, effort, responsibility and working conditions; is the choice of sub-factors, if used, undertaken free of gender bias; are levels or equivalencies, if used, free of gender bias; and is the composite required by s. 5(1) of the Act decided in such a way that gives value to all the statutory criteria and is point weighting free of gender bias? In this case, while the sub-factors do provide a range of possibilities for incumbents to identify and record job requirements, the selection of sub-factors does not cure the serious deficiencies in accurate collection of job information. Parties must evaluate whether the assignment of weights unfairly rewards or penalizes male or female job classes. With respect to the use of equivalencies, the Tribunal finds that the failure of the questionnaire to make women's work visible is aggravated by the weighting embedded in it.

The following considerations are helpful in determining whether the tool or mechanism used to determine the value of the work was applied in a gender neutral way: is the valuing tool of the comparison system applied consistently without regard to the gender of the job class; if a committee is used to evaluate jobs, is it representative, balancing the interests of the parties with duties and obligations under the Act; if a committee is part of the system, is it sufficiently knowledgeable to enable the parties to meet their obligations; is the decision making process accomplished in a manner free of gender bias; and did the mechanism identify systemic wage discrimination. In this case, committee training was inadequate.

### Pay Equity Process – Negotiation – Good Faith – Choice of Representative
### Pay Equity Process – Negotiation – Good Faith – Content of Proposals
### Pay Equity Process – Negotiation – Good Faith – Disclosure
### Pay Equity Process – Negotiation – Good Faith – Recognition of Bargaining Agent
### Pay Equity Process – Negotiation – Good Faith – Full and Informed Discussion

The Applicant alleged that the Respondent failed to negotiate in good faith and endeavour to agree upon a pay equity plan and a gender neutral comparison system by:

(1) unilaterally hiring a consulting firm and using the consultant as spokesperson in negotiations without the agreement of the Applicant;

(2) choosing the system and investing too much in it prior to negotiations to be willing to honestly bargain;

(3) using the mandatory time frames as an excuse to by-pass its bargaining obligations;

(4) refusing to recognize the bargaining agent;

(5) drafting the initial job questionnaire and pilot testing the system without the agreement of the applicant;

(6) abdicating all responsibility to the consultant and failing to meaningfully negotiate with the Applicant;

(7) refusing to disclose significant information, including results of the pilot test, to the Applicant, which prevented the Applicant from evaluating the Respondent's proposals;

(8) planning to implement one comparison system across the Municipal Corporation without negotiating with the Union; and

(9) failing to engage in rational discussion or to respond adequately to the Applicant's criticisms, questions or proposals.

The Tribunal held that the Respondent breached the bargaining duty in engaging in conduct described in allegations 2, 4, 6, 7, 8 and 9.

The Tribunal's inquiry into the obligation to "negotiate in good faith and endeavour to agree" will examine both the substance and the process of pay equity negotiations based upon the content, time frames and results required by the *Act*. "Good faith" requires an assessment by the Tribunal of how a reasonable person or party in good faith would approach these negotiations. "Endeavour to agree" requires not only an assessment of their efforts to meet, discuss and meaningfully negotiate an agreement on the gender neutral comparison system, but also an investigation into whether the substance of their proposals meet the obligations of the *Act*. The Tribunal looked at the following indicia in assessing whether there was failure to meet the obligations in section 7 and 14 of the *Act*. They require the parties to recognize who they must bargain with; what they must do in preparation; what they must disclose to the other party; and finally what the standards of discussion or negotiation are.

- Did the Employer recognize and negotiate with the bargaining agent as defined by the *Act*?
- In preparing the proposal, did the party make reasonable inquiries to ensure the proposed comparison system was gender neutral?
- Were the parties willing to demonstrate how the proposal was gender neutral?
- Has the party given sufficient information to enable the other party to intelligently appraise the proposal?
- Is the information sought rationally related to the issues in pay equity bargaining?
- Was there a willingness by the parties to discuss meeting the statutory requirements?
- Have parties given a justification of their positions at the negotiation table?
- Have parties carefully considered and responded to the objections, concerns and bargaining positions of the other party?

The duty to bargain under s. 14 does not extend to the choice by one party to retain the services of an individual or organization to formulate bargaining proposals. Neither does it extend to choice of the other party's negotiator. Parties to the pay equity process may have the spokesperson of their choice at the bargaining table, but the parties are responsible for any conduct or any actions taken by their agents on their behalf.

Failure to deal directly with the bargaining agent is a violation of the Act and any attempt to bargain directly with employees or local Applicant officials instead of the recognized bargaining agent is a violation of the obligation. An employer has a right to communicate with its employees to inform them of its obligations under the Act. The Respondent's actions in this case did not violate the bargaining obligations since the sessions it held were merely informational and did not constitute an attempt to negotiate directly with the employees.

The evidence disclosed that the provincial organization is the certified bargaining agent for the bargaining units, and that it negotiates and is signator to the collective agreements. The bargaining history between the parties confirmed this. In continuing to by-pass the bargaining agent by negotiating with local officials after the Applicant raised the issue, the Respondent undermined its authority to negotiate with the bargaining agent. To photocopy the bargaining agent is no defense to the failure to recognize and negotiate with the bargaining agent.

The fact that the Respondent wanted a centralized bargaining structure and one system for its establisment was a reasonable bargaining position. The statute provides a mechanism to allow parties to negotiate centrally if they agree to; however, there is no obligation to do so and in fact the Act requires the Respondent to bargain a comparison system and pay equity plan with each bargaining agent. The Respondent had no authority to force the Applicant to agree to one central system. Its refusal to continue negotiation was thus tantamount to a refusal to recognize the bargaining agent and is a violation of the obligation to negotiate in good faith.

The Tribunal recognizes that it is not possible for a party to absolutely ensure the gender neutrality of its proposed comparison system, particularly in meeting obligations under a new statute with little caselaw as guidance to the legal standards. However, this does not allow a party to opt out of its statutory obligations to negotiate in good faith and to endeavour to agree on such a system. In this case, at the point at which the Applicant raised concerns about the gender neutrality of the proposed system, the Respondent had an obligation to make inquiries and to make reasonable efforts to asssess whether the concerns were founded or not. The Respondent did not investigate the Applicant's complaints other than to obtain assurances from the consultant, and it made no effort to demonstrate to the Applicant that the system was gender neutral or that the system would identify and value the work performed by male and female job classes. Although the proposal to use its system was a reasonable first bargaining position, it is not a defence to complete inflexibility.

The Respondent does not dispute that it promised on a number of occasions to draft terms of reference and it never did so. This does not constitute a violation of the disclosure obligation.

Parties require sufficient information to be able to conduct bargaining in a rational and informed manner. The obligation to disclose includes an obligation to give sufficient information to allow parties to test the gender neutrality of their own proposals and to assess the bargaining position of the other party. In this case, the Tribunal finds that the Respondent failed to meet its obligation to disclose by refusing to reveal the results of the pilot test. The results of the test may have assisted the Applicant in appraising the Respondent's proposals and in formulating its own bargaining positions. Also, the Respondent was aware when it hired the consultant that the questionnaire was to be fed into a computer to tabulate and average incumbent and supervisor responses. The Respondent did not disclose the information it was given on the computer program or the weighting embedded in the questionnaire when asked by the Applicant for more details on the system. The Respondent thus did not give the Applicant sufficient information to intelligently appraise the system.

It is not enough that the parties have the common objective of posting a pay equity plan, they must also meet the obligation to have a full and informed discussion of all pay equity issues. This means that the parties must give justification for their positions

at the bargaining table and must carefully consider and respond to the objections, concerns and bargaining positions of the other party. In this case, the initial development of an action plan and time schedule by any party as a proposal to bring to the bargaining table is not subject to the bargaining obligation. However, the Respondent began implementing the initial stages of its plan prior to negotiation. Any involvement of the Applicant was scheduled well into the process. Although it is commendable that the Respondent promised to keep the Applicant informed of the details of the process, the obligation to negotiate and endeavour to agree under the Act is much higher. The Respondent also failed in the obligation to have a full and informed discussion by failing to communicate key information to the Applicant with respect to the comparison system despite repeated requests by the Applicant for more information and by continuing to insist on using the system without providing adequate justification for so doing. The Respondent further failed in its bargaining obligations by adopting its own interpretation of the Act and being unwilling to consider any other. However, the Respondent did not violate the Act by conducting a pilot test. Any party is entitled to test its proposals in attempting to meet its statutory obligations. Practically speaking, it is preferable that the parties jointly conduct testing, but the conducting of a pilot test by one party does not constitute a violation of the bargaining duty.

## Pay Equity Process – Negotiation – Good Faith – Defences

The Tribunal found that the Employer had failed to bargain in good faith. The Employer contended that it was entitled to act as it did because the *Act* placed paramount responsibility on the Employer for the achievement of pay equity.

The Tribunal rejected the Employer's defence.

Although the Respondent has important obligations under the Act, they cannot be taken as pre-empting the duty of the Applicant to also meet its statutory obligations. The obligations imposed upon the bargaining agent are of equal importance. The obligations assume an equal partnership to the pay equity negotiation process. Each party should make an effort to inform itself of its obligations and to negotiate pay equity in a manner which does not interfere with or prevent the other party from meeting its statutory obligations. The time frames established by the Act do not serve as a defence to unilateral decision making. The Act includes a dispute resolution mechanism when the parties reach a block or impasse. Neither can the parties opt out of their statutory obligations to negotiate and endeavour to agree because of cost and efficiency considerations.

## PEHT – Remedies – Failure to Negotiate in Good Faith

The Tribunal found that an Employer had failed to negotiate the component parts of a gender neutral comparison system; failed to recognize the bargaining agent; failed to disclose information; failed to engage in full and informed discussion; and proposed a comparison system that did not meet the standard of gender neutrality. The issue was what remedy the Tribunal should order.

The Tribunal ordered the Respondent to negotiate in good faith and to endeavour to agree with the Applicant upon a gender neutral comparison system and a pay equity plan. It ordered both parties to table proposals within 60 days, to co-operate with each other, and to provide full disclosure concerning the comparison systems proposed.

Remedies are not to be punitive but should be aimed at rectifying the consequences of a violation of the Act. They should be fair and equitable and crafted in such a way as to allow the parties to fulfill their obligations under the Act as expeditiously as possible. In this case, to send the parties back to the negotiating table without any direction or timeframes would not serve to facilitate speedy completion and posting of a pay equity plan. Nor is it appropriate to require the Applicant necessarily to bargain to amend the Respondent's proposed comparison system. Given the bargaining history, this might encourage parties in the future to unilaterally adopt a comparison system confident that the Tribunal would accept that system despite the bargaining conduct. However, the Tribunal is not persuaded that the comparison system is irreparable and it may be that the system can be effectively remedied now that the parties have both some guidance as to the standard of gender neutrality and direction with respect to their bargaining obligations. Thus, while the parties are to be given some flexibility in the choice of comparison system, they must meet particular requirements and deadlines in order that there be an expeditious completion of the pay equity plan. The Tribunal recommends that the parties seek the mediation services provided by the Review Services Branch of the Pay Equity Office.

## Processus d'équité salariale – Système non sexiste de comparaison – Éléments

HaldimandLe requérant prétendait que le système d'évaluation à points des emplois que proposait l'intimé était sexiste, car il n'identifiait pas ni n'éliminait, de façon systématique, les éléments discriminatoires systémiques compris dans le salaire des infirmières. Il soutenait notamment que le système ne décrivait pas, ne mesurait pas, ni n'évaluait, d'une façon systématique, globale et exacte, les spécifications du travail des infirmières comprises dans les unités de négociation que représentait le requérant.

Le Tribunal a statué que le système était sexiste.

Un système non sexiste de comparaison doit pouvoir permettre d'analyser et d'éliminer les structures de salaires systémiques qui sont discriminatoires. Il faut accorder une attention toute particulière à l'évaluation du travail des catégories d'emplois à prédominance féminine afin de s'assurer que le système de comparaison élimine la sous-évaluation historique du travail des femmes.

Même si un système de comparaison non sexiste peut supposer l'utilisation d'un système méthodique d'évaluation des emplois, cela n'est pas toujours nécessaire, car la *Loi* exige des parties qu'elles aient recours à un système non sexiste de comparaison, mais elle ne comporte aucune référence particulière à l'évaluation des emplois.

Un système non sexiste de comparaison comprend quatre composantes : 1) la collecte de données précises sur les emplois; 2) le choix d'un mécanisme ou d'un outil pour établir des liens entre ces données et la valeur du travail; 3) l'application du mécanisme afin de définir la valeur du travail exécuté; et 4) l'établissement de comparaisons. Lors des négociations sur le système, les parties ont la possibilité d'élaborer et de concevoir un système de comparaison qui répond à leurs besoins. Elles sont tout d'abord tenues de s'assurer que chaque composante du système de comparaison est impartiale. Un parti pris dans une composante se répercute dans l'ensemble du système. Il importe donc que toutes les composantes du système de comparaison soient dénuées de toute marque de sexisme.

Il faut aussi que les données relatives aux catégories d'emplois à prédominance féminine et aux catégories d'emplois à prédominance masculine sur les plans de l'habileté, de l'effort et de la responsabilité qu'exige normalement l'accomplissement du travail, de même que sur le plan des conditions dans lesquelles il est normalement effectué soient consignées et évaluées le

plus exactement et le plus complètement possible. Lorsqu'il a évalué le caractère non sexiste du processus de collete de données prévu dans le système de comparaison, le Tribunal a étudié les éléments suivants :

a) la gamme des travaux accomplis dans l'établissement;

b) si le système rendait le travail, et plus particulièrement le travail des femmes, visible au lieu de travail;

c) si les données recueillies à l'égard des catégories d'emplois à prédominance féminine visées par le programme et des catégories d'emplois à prédominance masculine utilisées à des fins de comparaison décrivaient exactement l'habileté, l'effort et la responsabilité qu'exige normalement l'accomplissement de ce travail, ainsi que les conditions dans lesquelles il est normalement effectué;

d) si les données relatives aux emplois qui étaient recueillies décrivaient exactement et uniformément chaque catégorie d'emplois devant faire l'objet d'une comparaison.

Quel que soit le système de comparaison proposé, il importe de tenir compte de la nature de l'établissement auquel il sera appliqué. Il faut donc examiner la nature de l'organisme, les services qu'il fournit ou les produits qu'il fabrique. Le système doit couvrir plus particulièrement la gamme des tâches qu'effectuent les membres des catégories d'emplois à prédominance féminine.

Étant donné que la plupart des hommes et des femmes exercent des emplois différents, caractérisés par des habiletés différentes et des spécifications différentes, une des principales exigences d'un système non sexiste de comparaison doit être d'accroître, au moyen des critères définis par la loi, la visibilité des caractéristiques qui n'étaient pas visibles antérieurement et qui, par conséquent, n'étaient pas évaluées. Quel que soit le mode de collecte des données utilisé, les parties doivent évaluer si les réponses données permettront d'obtenir des renseignements sur le travail effectivement accompli et ne seront pas simplement une fonction de la façon dont les hommes et les femmes décrivent leur travail. Le système de comparaison de l'intimé et, plus particulièrement, le questionnaire relatif aux données sur l'emploi, n'accorde aucune visibilité au travail des catégories d'infirmières dans l'établissement.

Dès que le système de comparaison a satisfait à la première exigence, qui est de recueillir des données exactes relatives aux catégories d'emplois devant faire l'objet de la comparaison sur les plans de l'habileté, de l'effort et de la responsabilité qu'exige normalement l'accomplissement du travail, ainsi que sur le plan des conditions de travail dans lesquelles il est normalement effectué, il doit être appliqué d'une façon uniforme. L'uniformité est une exigence nécessaire mais non suffisante d'impartialité. L'application uniforme d'un système qui ne permet pas de recueillir des données exactes sur les exigences liées à un poste et qui est sexiste ne favorisera par l'objectif d'impartialité. En outre, un système de comparaison qui est appliqué de façon uniforme et qui se traduit par quelques augmentations de salaire en ce qui concerne les catégories d'emplois à prédominance féminine ne confirme pas son impartialité aux yeux des parties.

Le mécanisme ou l'outil servant à évaluer le travail effectué constitue une composante complexe du système non sexiste de comparaison. Son choix doit faire l'objet de négociations dans le cadre du système. Les éléments suivants peuvent servir à déterminer si l'outil d'évaluation est impartial : l'outil peut-il permettre d'établir la valeur du travail effectué au moyen des critères fixés par la loi que sont l'habileté, l'effort et la responsabilité qu'exige l'accomplissement du travail et les conditions dans lesquelles le travail est normalement effectué?; le processus menant au choix de sous-facteurs, le cas échéant, est-il dénué de tout sexisme?; les niveaux ou équivalences, le cas échéant, sont-ils dénués de tout sexisme?; est-ce que le critère global qu'exige le paragraphe 5 (1) de la *Loi* est choisi d'une façon qui affecte une valeur à tous les critères prévus par la *Loi* et est-ce que les cotes de pondération sont dénuées de sexisme? Dans la présente affaire, même si les sous-facteurs prévoient toute une gamme de possibilités permettant aux titulaires de poste de définir et de consigner les exigences de leur poste, le choix de ces sous-facteurs ne remédie pas aux lacunes importantes qui existent sur le plan de la collecte de données exactes sur les emplois. Les parties doivent évaluer si les cotes de pondération récompensent ou pénalisent injustement les catégories d'emplois à prédominance masculine ou féminine. Quant à l'emploi d'équivalences, le Tribunal conclut que les cotes de pondération utilisées dans le questionnaire aggravent le défaut du questionnaire d'accroître la visibilité du travail des femmes.

Les critères suivants permettent d'établir si l'outil ou le mécanisme servant à fixer la valeur du travail a été appliqué d'une façon impartiale : l'outil d'évaluation du système de comparaison est-il appliqué d'une façon uniforme quel que soit le sexe des travailleurs compris dans la catégorie d'emplois?; si un comité est utilisé pour évaluer les emplois, est-il représentatif et met-il en équilibre, d'une part, les intérêts des parties et, d'autre part, leurs devoirs et obligations en vertu de la *Loi*?; si un comité fait partie du système, est-il suffisamment compétent pour permettre aux parties de satisfaire à leurs obligations?; le processus décisionnel se déroule-t-il d'une manière impartiale?; le mécanisme permet-il de repérer les formes de discrimination systémique en matière de rétribution? Dans la présente affaire, la formation des membres du comité était inadéquate.

**Processus d'équité salariale – Négociations – Bonne foi – Choix de représentant**

**Processus d'équité salariale – Négociations – Bonne foi – Contenu des propositions**

**Processus d'équité salariale – Négociations – Bonne foi – Divulgation**

**Processus d'équité salariale – Négociations – Bonne foi – Reconnaissance de l'agent négociateur**

**Processus d'équité salariale – Négociations – Bonne foi – Échanges francs et éclairés**

Le requérant prétendait que l'intimé n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un programme d'équité salariale et d'un système non sexiste de comparaison. Il a invoqué ce qui suit :

1) l'intimé a unilatéralement engagé une firme d'experts-conseils et retenu les services d'un consultant comme porte-parole lors des négociations sans l'accord du requérant;

2) il a choisi un système et y a investi trop d'efforts et d'argent avant les négociations pour être en mesure de négocier honnêtement;

3) il a invoqué les délais prescrits pour contourner ses obligations en matière de négociations;

4) il a refusé de reconnaître l'agent de négociateur;

5) il a rédigé la version initiale du questionnaire sur l'emploi et a procédé à l'essai-pilote du système sans l'accord du requérant;

6) il a délégué toutes ses responsabilités à l'expert-conseil et n'a pas négocié de façon valable avec le requérant;

7) il a refusé de divulguer des renseignements importants, y compris les résultats de l'essai-pilote, au requérant, ce qui a empêché ce dernier d'évaluer les propositions de l'intimé;

8) il a planifié de mettre en oeuvre un système de comparaison à l'échelle de la municipalité sans négocier avec le syndicat;

9) il a refusé de participer à des discussions rationnelles ou de répondre convenablement aux critiques, aux questions ou aux propositions du requérant.

Le Tribunal a statué que l'intimé avait manqué à son devoir de négociation lorsqu'il a exercé les activités décrites aux points 2, 4, 6, 7, 8 et 9.

L'enquête que le Tribunal mènera sur l'obligation de «négocier de bonne foi et de s'efforcer de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale» portera tant sur le fond que sur le processus de négociations d'un programme d'équité salariale, compte tenu du contenu, des délais et des résultats qu'exige la *Loi*. En ce qui concerne le concept de «bonne foi», le Tribunal doit étudier la façon dont une personne ou une partie raisonnable participerait à ces négociations. Quant à l'obligation de «s'efforcer de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale», il convient non seulement d'évaluer les efforts qu'ont faits les parties en vue de se rencontrer, de discuter et de négocier, de façon valable, une entente sur le système non sexiste de comparaison, mais également d'enquêter sur la question de savoir si le fond de leurs propositions répond aux obligations de la *Loi*. Lorsqu'il a évalué si les parties n'avaient pas respecté les obligations prévues aux articles 7 et 14 de la *Loi*, le Tribunal a examiné les indices décrits ci-dessous. Les obligations prévues à ces deux articles exigent des parties qu'elles reconnaissent les personnes ou entités avec lesquelles elles doivent négocier, précisent ce qu'elles doivent faire en vue de se préparer et les renseignements qu'elles doivent se communiquer et, finalement, fixent les normes relatives à la discussion ou aux négociations.

- L'employeur a-t-il reconnu l'agent négociateur défini dans la *Loi* et a-t-il négocié avec lui?
- Lorsqu'elle a élaboré sa proposition, la partie a-t-elle fait des enquêtes raisonnables en vue de s'assurer que le système de comparaison proposé était impartial?
- Les parties étaient-elles prêtes à expliquer le caractère impartial de leur proposition?
- Les parties se sont-elles communiqué suffisamment de renseignements pour pouvoir évaluer la proposition de façon intelligente?
- Les renseignements qu'on cherche à obtenir sont-ils reliés, d'une façon rationnelle, aux questions en litige dans les négociations concernant l'équité salariale?
- Les parties étaient-elles disposées à discuter de la façon de répondre aux exigences de la loi?
- Les parties ont-elles expliqué leur position à la table des négociations?
- Les parties ont-elles étudié attentivement leurs objections et leurs préoccupations respectives et leur position en ce qui concerne les négociations et y ont-elles répondu?

L'obligation de négocier prévue à l'article 14 ne comprend pas la possibilité, pour une partie, de retenir les services d'une personne ou d'un organisme en vue de formuler des propositions en ce qui concerne les négociations. Elle ne s'applique pas non plus au choix de l'agent négociateur de l'autre partie. Les parties au processus d'équité salariale peuvent se faire représenter par le porte-parole de leur choix à la table des négociations, mais elles sont responsables des mesures prises par leur mandataire en leur nom.

Le défaut de négocier directement avec l'agent négociateur constitue une infraction à la *Loi* et toute tentative de négociations directes avec les employés ou les dirigeants locaux du requérant au lieu de l'agent négociateur reconnu constitue une infraction à cette obligation. L'employeur a le droit de communiquer avec ses employés afin de les informer de ses obligations en vertu de la *Loi*. Les mesures prises par l'intimé dans la présente affaire ne constituaient pas une infraction à ses obligations en matière de négociations étant donné que les sessions qu'il a organisées avaient un caractère purement informatif et ne représentaient pas une tentative de négociations directes avec les employés.

Les preuves fournies révèlent que l'organisation provinciale est l'agent négociateur accrédité pour les unités de négociation et qu'il négocie et signe les conventions collectives. L'historique des négociations entre les parties a confirmé cet état de choses. Lorsqu'il a continué de contourner l'agent négociateur en négociant avec les dirigeants locaux après que le requérant a soulevé cette question, l'intimé a amoindri son pouvoir de négociation avec l'agent négociateur. Le fait de fournir à l'agent négociateur les photocopies de sa correspondance avec le dirigeant local ne constitue pas une défense en ce qui concerne le défaut de le reconnaître et de négocier avec lui.

Le désir de l'intimé d'avoir une structure de négociation centralisée et un seul système pour son établissement constituait une position de négociation raisonnable. La loi prévoit un mécanisme qui permet aux parties d'organiser des négociations centrales si elles le désirent. Toutefois, elles ne sont pas obligées de ce faire et, en fait, la *Loi* exige de l'intimé qu'il négocie un système de comparaison et un programme d'équité salariale avec chaque agent négociateur. L'intimé n'avait pas le droit de contraindre le requérant à accepter un système centralisé. Son refus de poursuivre les négociations équivalait donc à un refus de reconnaître l'agent négociateur et constituait une infraction à son obligation de négocier de bonne foi.

Le Tribunal reconnaît qu'il n'est pas possible, pour une partie, de garantir de façon absolue le caractère non sexiste du système de comparaison qu'elle propose, particulièrement lorsqu'il s'agit de respecter les obligations qu'impose une nouvelle loi dont le

corpus jurisprudentiel en matière de normes légales est minime. Toutefois, cela n'autorise pas une partie à choisir de ne pas respecter son obligation légale de négocier de bonne foi et de s'efforcer de convenir d'un système. Dans la présente affaire, lorsque le requérant a soulevé des doutes sur le caractère non sexiste du système proposé, l'intimé était tenu de mener des enquêtes et de faire des efforts raisonnable en vue de déterminer si ces doutes étaient fondés ou non. L'intimé n'a pas enquêté sur les plaintes du requérant. Il s'est contenté d'obtenir des assurances de l'expert-conseil et il n'a rien fait en vue de prouver au requérant que le système était impartial ou qu'il permettrait d'identifier et d'évaluer le travail effectué par les catégories d'emploi à prédominance féminine et à prédominance masculine. Même si le projet d'utiliser son système était une première position de négociation raisonnable, il ne constitue pas une défense en ce qui concerne son inflexibilité totale.

L'intimé ne conteste pas le fait qu'il a promis à plusieurs reprises de rédiger un mandat et qu'il ne l'a jamais fait. Cela ne constitue pas une infraction à l'obligation de divulguer des renseignements.

Les parties ont besoin de renseignements suffisants pour pouvoir mener des négociations d'une façon rationnelle et éclairée. L'obligation de divulguer des renseignements comprend l'obligation de donner suffisamment de renseignements pour permettre aux parties de tester le caractère non sexiste de leurs propres propositions et d'évaluer la position de négociation de l'autre partie. Dans la présente affaire, le Tribunal conclut que l'intimé n'a pas respecté son obligation de divulguer des renseignements lorsqu'il a refusé de révéler les résultats de son essai-pilote. Les résultats de ce test auraient pu aider le requérant à évaluer les propositions de l'intimé et à formuler sa propre position de négociation. De plus, l'intimé savait, lorsqu'il a engagé l'expert-conseil, que le questionnaire allait être traité par un ordinateur qui allait dépouiller et faire la moyenne des réponses des titulaires de poste et des superviseurs. L'intimé n'a pas divulgué les renseignements qu'il a obtenus sur le programme informatique lui a donnés ni la cote de pondération du questionnaire lorsque le requérant lui a demandé de plus amples renseignements sur le système. Par conséquent, l'intimé n'a pas donné suffisamment de renseignements au requérant pour lui permettre d'évaluer de façon intelligente le système.

Il ne suffit pas non plus que les parties aient le même objectif d'afficher un programme d'équité salariale. Elles doivent aussi respecter l'obligation d'avoir des échanges francs et éclairés sur tous les points concernant le programme d'équité salariale. Cela veut dire que les parties doivent justifier leur position à la table des négociations, étudier attentivement les objections et les préoccupations de l'autre partie et sa position de négociation, et y répondre. Dans la présente affaire, l'élaboration initiale d'un plan d'action et d'un calendrier par une partie en tant que proposition à soumettre à la table des négociations n'entre pas dans l'obligation de négocier. Toutefois, l'intimé a commencé à mettre en oeuvre les premières étapes de son programme avant les négociations. La participation du requérant était prévue à une étape ultérieure du processus. Même s'il est louable que l'intimé ait promis de communiquer les détails du processus au requérant, l'obligation de négocier et de s'efforcer de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale est beaucoup plus exigeante. De plus, l'intimé n'a pas eu des échanges francs et éclairés, car il n'a pas fourni des renseignements clés au requérant en ce qui concerne le système de comparaison malgré les demandes répétées du requérant pour obtenir de plus amples renseignements et il a continué d'insister pour utiliser le système sans fournir d'explications appropriées. En outre, l'intimé n'a pas respecté ses obligations en matière de négociations lorsqu'il a adopté sa propre interprétation de la *Loi* et n'a pas voulu étudier d'autres interprétations. Toutefois, l'organisation de l'essai-pilote ne constitue pas une infraction à la *Loi*. Les parties ont le droit de mettre leurs propositions à l'essai lorsqu'elles tentent de satisfaire aux obligations qu'impose la loi. Il est préférable, en termes pratiques, que les parties procèdent ensemble à des essais, mais, l'organisation, par une partie, d'un essai-pilote, ne constitue pas une infraction à son obligation de négocier.

## Processus d'équité salariale – Négociation – Bonne foi – Défense

Le Tribunal a conclu que l'employeur n'avait pas négocié de bonne foi. L'employeur a soutenu qu'il avait le droit de faire ce qu'il a fait, car la *Loi* lui confère la responsabilité ultime de réaliser l'équité salariale.

Le Tribunal a rejeté le moyen de défense de l'employeur.

Même si les obligations que la *Loi* confère à l'employeur sont importantes, elles ne peuvent pas prendre le pas sur le devoir du requérant de respecter ses obligations légales. Les obligations que doit respecter l'agent négociateur sont tout aussi importantes. Ces obligations supposent que les partenaires au processus de négociation de l'équité salariale sont sur un même pied d'égalité. Chaque partie doit faire des efforts en vue de se renseigner sur ses obligations et de négocier un programme d'équité salariale d'une façon qui ne gêne pas l'autre partie ni ne l'empêche de respecter ses obligations. Les délais prévus par la *Loi* ne constituent pas un moyen de défense en ce qui concerne la prise de décisions unilatérales. La *Loi* comprend un mécanisme de résolution des litiges lorsque les parties arrivent à une impasse. De plus, les parties ne peuvent pas choisir de ne pas respecter leur obligation légale de négocier de bonne foi et de s'efforcer de convenir d'un système de comparaison et d'un programme d'équité salariale en invoquant des motifs financiers et pratiques.

## T.É.S. – Recours – Défaut de négocier de bonne foi

Le Tribunal a conclu que : 1) l'employeur n'avait pas négocié les composantes d'un système non sexiste de comparaison; 2) il n'avait pas reconnu l'agent négociateur; 3) il n'avait pas divulgué des renseignements; 4) il n'avait pas participé à des échanges francs et éclairés; et 5) il avait proposé un système de comparaison qui ne respectait pas la norme d'impartialité. Le Tribunal devait décider du recours.

Le Tribunal a ordonné à l'intimé de négocier de bonne foi et de s'efforcer de convenir, avec le requérant, d'un système non sexiste de comparaison et d'un programme d'équité salariale. Il a ordonné aux deux parties de déposer des propositions dans les 60 jours, de collaborer et de divulguer tous les renseignements concernant les systèmes de comparaison proposés.

Les recours n'ont pas pour but d'être punitifs, mais ils devraient viser à remédier aux conséquences d'une infraction à la *Loi*. Ils devraient être justes et équitables et conçus de façon à permettre aux parties de satisfaire le plus rapidement possible aux obligations que leur impose la *Loi*. Dans la présente affaire, le fait de renvoyer les parties à la table des négociations sans leur donner de directives ou sans imposer de délais ne faciliterait ni l'adoption rapide d'un programme d'équité salariale ni son affichage. Il n'est pas approprié non plus d'exiger du requérant qu'il négocie afin de modifier le système de comparaison que propose l'intimé. Compte tenu des négociations antérieures, une telle mesure risque d'encourager les parties à adopter unilatéralement, à l'avenir, un système de comparaison, car elles sauront que le Tribunal va accepter ce système malgré leur comportement pendant les négociations. Toutefois, le Tribunal n'est pas persuadé que le système de comparaison est irréparable. On peut peut-être le modifier efficacement maintenant que les parties ont reçu des conseils sur la norme

**d'impartialité et des directives sur leurs obligations en ce qui concerne les négociations. Ainsi, même si les parties disposent d'une certaine souplesse en ce qui concerne le choix d'un système de comparaison, elles doivent respecter certaines exigences et certains délais afin qu'il soit possible d'élaborer un programme d'équité salariale dans les meilleurs délais. Le Tribunal recommande que les parties tentent d'avoir recours aux services de médiation qu'offre la Direction des services de révision du Bureau d'équité salariale.**

## DECISION OF THE TRIBUNAL, MAY 29, 1991

1. This is an application by the Ontario Nurses Association ("ONA") alleging that the Respondent Employer, the Regional Municipality of Haldimand-Norfolk ("Regional Municipality") has violated the *Pay Equity Act, 1987* ("the *Act*"). Specifically, ONA alleges that the Regional Municipality adopted a gender biased comparison system and that the Employer failed to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and pay equity plan contrary to sections 4, 5, 6(1), 7, 12, 13, and 14 of the *Act*. We will address these allegations in turn.

2. ONA is the certified bargaining agent for nurses employed by the Regional Municipality at its Regional Health Unit (Local 78) and for part time nurses in a second bargaining unit at two Homes for the Aged, Norview Manor and Grandview Lodge (Local 153). Each of the bargaining units has a collective agreement with the Regional Municipality and this Employer was required to post its pay equity plans on or before January 1, 1990.

3. Nurses in both settings must be licensed to practice in the province of Ontario in accordance with statutory requirements. In addition, nursing practice is governed not only by their Employer, but also by the Standards of Nursing Practice, administered by the College of Nurses of Ontario. The Public Health nurses are professionally responsible for a wide range of public health programs, including the control of communicable diseases and immunization services; counselling programmes such as family planning, pre-natal and post-natal programmes; pre-school and school health services. They are responsible for home visits and arrangement of home care services. They plan and deliver health care services, such as newborn assessments, crisis intervention and health needs assessments. They are responsible for initiating, developing and teaching a large range of educational programs in the community including nutrition, basic hygiene, teaching clients to self-administer some medications, post-surgical care and AIDS prevention. They work with public officials such as police, doctors, administrators and professionals in health, community and social services to implement programmes required by Government statute and regulation. They co-ordinate or arrange other health care and community services such as children's aid and referrals to support shelters, to respond to both acute and chronic health care needs of the community.

4. The nurses in the Home for the Aged are professionally responsible for planning and delivery of direct care and the health and safety of elderly and infirm patients. Their work includes advocacy on behalf of patients, observation, assessment and evaluation of their health needs and social well-being. Nurses must co-ordinate a team of health care providers, including other nurses, dieticians, and health care aides to ensure that the appropriate health care is provided to patients. On evenings, nights and weekends, a nurse is often "in charge" and as the supervisory person on site, is responsible for the operation of the Home. Nurses prepare and administer medications, apply treatments and dressings, and are responsible for documenting, and making decisions in complying with doctors' orders. Nurses must always be prepared to deal with deaths in the Home, ranging from the physical aspects of death of residents, to providing comfort and counselling to family, friends and other residents.

5. Both bargaining units are comprised solely of female job classes. As a result, section 6(5) of the *Act* requires that these female job classes shall be compared to male job classes throughout the establishment for

the purposes of achieving pay equity for these bargaining units. The establishment is the Regional Municipality of Haldimand-Norfolk. Both parties acknowledged that the comparison system must collect and value the job requirements of both the nurse job classes and the male job classes to be compared, however the system's ability to successfully collect the work of male comparators was not an issue before us.

## *Gender Neutral Comparison System*

6. In this case, ONA alleges that the Regional Municipality violated the *Act* by adopting a comparison system which is not gender neutral, specifically that it does not systematically identify and therefore redress systemic discrimination in the nurses wages. The comparison system proposed by the Regional Municipality was developed by William M. Mercer Ltd ("Mercer") and is a point factor job evaluation system; it includes questionnaire development, factor selection, pilot testing, collection of data, grouping of data, a job evaluation committee process, weighting and creation of new job hierarchy, identification of male comparators and a process of undertaking the comparisons.

7. In particular, ONA alleges that the comparison system introduced by the Employer fails to systematically, comprehensively and accurately describe, measure and value the job content of the work of the nurses in the ONA bargaining units as compared to male job classes in the Regional Municipality. ONA alleges that the Respondent's minor amendments to the questionnaire are insufficient to address the fundamental gender bias embedded in the comparison system, and that the proposed joint committee process will not cure that gender bias. ONA further alleges that the Regional Municipality failed to discharge its onus of establishing that its system is gender neutral. The Regional Municipality denies the allegations and submits that its system is gender neutral. It further submits that in preferring to adopt a system to apply to jobs across the Municipality, it is not essential to have job specificity.

8. This is the first case in which the issue of gender neutrality has been litigated. The question of what is gender neutral is a complex one and this is only a first assessment of what might constitute legal standards. We found the evidence and submissions of both parties to be very thorough and thoughtful, and we commend the parties for their assistance. As a Tribunal we are bound by both the *Interpretation Act*[1] and the *Charter*[2] to interpret the *Pay Equity Act, 1987* in a fair and purposive manner having regard to both the objectives and the wording of the *Act* and the constitutionally enshrined guarantees of equality. In fact, the *Act* states in its preamble that affirmative action is required to redress systemic wage discrimination. Section 4 specifies that the purpose of the *Act* is to redress systemic wage discrimination in compensation for work performed by employees in female job classes.

9. It is increasingly acknowledged that the persistence of systemic wage discrimination acts as a barrier to the full and equal participation of women in the workforce. The Supreme Court of Canada in *Janzen v. Platy Enterprises Limited* cited with approval from *Bell v. Ladas*[3], in addressing related issues of sexual harassment and pay discrimination:

> The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the workplace and all of its benefits ... Where a

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1 Section 10 of the *Interpretation Act* R.S.O. 1970 c.225 specifies: such fair, large and liberal construction and interpretation as will best ensu re the attainment of the object of the *Act* according to its intent, meaning and spirit.

2 *Charter of Rights and Freedoms* R.S.C. 1985

3 (1980), 1 C.H.R.R. D/155 at D/156

> woman's equal access is denied or when terms or conditions differ when compared to male employees, the woman is being discriminated against[4] .

One such benefit is fair wages. A fair wage is important to the well-being of workers, not only in meeting the necessities of life, but in guaranteeing a sense of dignity and of recognition for the value of the work they perform. This has relevance in the context of pay equity. The *Act* requires Employers to remedy pay discrimination by identifying and redressing the wage gap through a pay equity plan. Where the Employer's employees are unionized, these obligations must be undertaken in conjunction with the bargaining agent.

10. The *Pay Equity Act, 1987* acknowledges that wage discrimination in women's salaries has been systemic. The *Act* does not seek to lay blame upon employers or unions for historical wage discrimination, but rather provides a framework for redressing that wage discrimination. Thus, motive and intent are unhelpful in assessing whether these parties have met their obligations under the *Act*; the goal is not to punish wrongdoers but rather to provide an effective remedy for wage discrimination[5]. This view was endorsed by the Supreme Court of Canada when interpreting federal anti-discrimination legislation in *Robichaud v. Canada (Treasury Board)*:

> Since the *Act* is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behavior, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the *Act* is directed to redressing socially undesirable conditions quite apart from their reasons for existence[6].

11. The *Pay Equity Act, 1987* specifically acknowledges that existing compensation practices have failed to recognize or remedy systemic wage discrimination. This discrimination is in large measure due to institutional practices rather than individual actions. Thus the requirement to use a gender neutral comparison system is one which reflects and attempts to remedy these historical problems. As such, the Employer is required to examine present compensation practices and to establish and maintain pay equity. Pay equity is achieved when:

> 6(1) For the purposes of this Act, pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value.

12. Section 12 of the *Act* creates a statutory obligation upon the Employer to use a gender neutral comparison system to undertake a comparison between female and male job classes in the establishment to determine whether pay equity exists. Section 12 requires:

> Before the mandatory posting date, every employer to whom this Part applies, shall, using a gender neutral comparison system, compare the female job classes in each establishment of the employer with the male job classes in the same establishment to determine whether pay equity exists for each female job class.

That comparison system must be able to assess the content requirements of both female and male job classes, and to establish a process to assess their relative value. In order for the system to be gender neutral, we find it must be able to analyse and rectify systemic patterns of wage discrimination. Since the *Act*

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4 [1989], 1.S.C.R. 1252 at 1277

5 See Re: *Ontario Human Rights Commission v. Simpson Sears Ltd.* [1985] 2 S. C.R. at p.547, see also *Action Travail des Femmes* v. C.N.R. *Co.* [1987] 1 S.C.R. 1114

6 [1987] 2 S.C.R. 84 at page 90

requires that discrimination in compensation of female work be addressed, particular attention must be paid in valuing the work of female job classes to ensure the comparison system remedies the historical undervaluation of women's work. In a unionized setting the parties must negotiate in good faith and endeavour to agree upon the gender neutral comparison system and the pay equity plan for each bargaining unit; there is an obligation upon both the Union and the Employer under section 7 to negotiate for compensation practices in such a manner as not to contravene the requirement to establish and maintain pay equity.

13. In this case, the parties were in dispute as to who bears the onus in establishing whether the proposed system is gender neutral. As the Supreme Court of Canada in *Simpson Sears*[7], has held, the issue of onus arises where the evidence does not indicate a clear result, and the concept of onus is available as a tie breaker, by requiring that one party or the other prove something on the balance of probabilities. In this case however, we find the evidence sufficiently clear as not to require resort to onus of proof under the *Pay Equity Act, 1987*.

14. The *Act* necessitates an inquiry by the Tribunal, when a complaint is filed, into whether the comparison system in any given establishment is "described" and whether it is "gender neutral". Thus in this case it is important to assess what constitutes a comparison system and what makes it gender neutral. We had the benefit of expert evidence from a number of disciplines. The Applicant called two expert witnesses. Dr. Lynda Ames is an expert in both the American and Canadian context, in job evaluation questionnaire construction, reliability and validity testing procedures, data management and analysis, and comparison systems as they relate to gender bias. Dr. Pat Armstrong is an expert on the nature of women's work in Canada, and in particular, work in the health care sector; with expertise in critiquing the gender effect of methodologies which capture and analyse the content of women's work. The Regional Municipality called three expert witnesses. Dr. Vida Scarpello has American expertise in compensation design, implementation and audit, and work generally, including job evaluation and consensus decision making. Dr. Charles Fay is an American expert in traditional job evaluation methodology and compensation, including information collection, evaluation and analysis as well as bias in human resource decision making. Mr. James Delaney, with the Mercer firm, is an experienced job evaluation consultant, who testified on the proposed job evaluation system in this case. Although we find the expert evidence is helpful in setting the context for these first cases, we are concerned that it not become the only route parties take to resolution or adjudication of these issues. We believe parties with obligations under the *Act* will themselves develop the skills to design and implement gender neutral comparison systems.

15. The Tribunal also considered at length the jurisprudence from other jurisdictions in Canada, the United States and the European Economic Community. However, at the time of our consideration of this case, other provincial jurisdictions in Canada had no jurisprudence interpreting provincial statutory requirements of gender neutrality and thus provided no assistance. The American caselaw on comparable worth must be read with caution because of different statutory requirements respecting onus, intentional discrimination and liability, as well as a very different context of labour and employment relations. Where jurisprudence is helpful from other jurisdictions, we have noted it.

16. The Regional Municipality is a public sector employer required to comply with Part II of the *Act*. Accordingly, it is required to negotiate and implement a pay equity plan for the female job classes in its establishment. Section 13 specifies what pay equity plans must include. Section 13(2)(a) specifies that

7 Supra at p. 193

where female and male job classes exist in an establishment, every pay equity plan "shall describe the gender neutral comparison system used for the purposes of section 12". A job comparison system is any system designed to determine the relative worth of jobs within an employer's establishment[8]. A gender neutral comparison system describes how the comparisons between male and female job classes are to be accomplished under the *Pay Equity Act, 1987; it* positively identifies and values characteristics of work, particularly women's work, which were historically undervalued or invisible. The *Act* recognizes that gender biases have existed and the gender neutral comparison system must work to consciously remove these biases. Gender bias can enter at different points in the process; in collecting information on job classes; in the selection and definition of sub-factors by which job classes may be evaluated; in weighting of factors and in the actual process of evaluating jobs[9]. The Supreme Court of Canada has said when addressing programs designed to redress systemic discrimination in employment, that a system must be able to analyse and destroy systemic patterns and must include measures designed to break the continuing cycle of systemic discrimination[10]. The purpose of using a gender neutral comparison system is to remove the arbitrariness and gender bias in the valuing of work. By introducing a systematic means of identifying and valuing work, the comparison system reduces some of the subjectivity and underlying assumptions in evaluating work which have been part of the historical pattern of wage discrimination encountered by women workers.

17. Consideration of the issues and evidence in this case has persuaded the Tribunal that there are four component parts of the gender neutral comparison system required to be described for the purposes of the *Act*; specifically: the accurate collection of job information; deciding on the mechanism or tool to determine how the value will attach to the job information; applying the mechanism to determine the value of the work performed; and making the comparisons. Accordingly, the Tribunal finds that parties must negotiate and endeavour to agree upon these elements of a gender neutral comparison system in order to meet the obligations to describe the system as required by section 13 of the *Act*.

18. Both parties led very helpful evidence on the historical context of women's work and on how wage discrimination is often embedded in existing compensation systems. Compensation practices have reflected long standing historical social and economic relations in which men were the "bread winners" and women the "at home care givers". When women entered the work force in large numbers, compensation systems continued to reflect that unequal economic status[11]. Women's work differs from men's work, both historically and today. Women work predominantly in the clerical, retail and service sectors and men continue to dominate the managerial, industrial and financial sectors. More importantly, however, for pay equity purposes, the skill, effort, responsibility and working conditions required for women's work differ from men's work. Many pay practices have failed to record or to value these differences. Deeply held attitudes meant the gender of a job class was viewed in the assessment of its value; if it was "women's work", it often led people, without any conscious decision making, to give less value to the work.

19. Traditional job evaluation often reinforced and perpetuated these attitudes, largely rewarding the skills and job content characteristics of male work and ignoring or giving less value to the skills and job content requirements of women's work. Originally, job evaluation was designed and applied in industrial and manufacturing workplaces, and to managerial positions. When these systems were applied to workplaces in

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8 Pay Equity Commission, *Pay Equity Implementation Series # 9*, July 1988 page 2.

9 Pay Equity Commission, *ibid*, page 2

10 *Action Travail des Femmes v. C.N.R CO., supra* at 1143

11 Evidence of Dr. Armstrong, Dr. Fay, Dr. Ames.

the health, service and office sectors, few changes were made to the underlying assumptions with which the value of jobs were assessed. The skills, ability and experience of women in these jobs were not recognized, leading to an inaccurate and inadequate appraisal of the value of their work, and the resultant wages paid to them[12]. Studies have demonstrated that the sex of the job incumbent has been a factor contributing to the traditional placement of the job within the hierarchy of the workplace in both wages and status[13]. Steinberg and Haignere conclude that traditional job evaluation methodologies created pervasive salary inequities by lowering the value of a characteristic or activity of work simply through its association as women's work. They conclude that this is a reflection of cultural and social stereotyping of the work traditionally done by women and the value attached to it. They found many job related skills are not treated as skills by evaluators, but rather as qualities "intrinsic to being a woman" and therefore not compensable[14]. Many compensation systems have made invisible the skills and responsibility required in women's work. These skills were associated with women's work in the home; patience and effective personal relations in raising and nurturing children, or care giving for ill or aging family members. Gender bias is embedded in conventional skill definitions of job complexity and human capital characteristics[15] . Those skills were invisible in job evaluation and were considered natural attributes of women as opposed to skills required on the job.

20. Although a gender neutral comparison system may involve a formalized job evaluation system, it need not necessarily do so, since the *Act* requires parties to use a gender neutral comparison system but makes no specific reference to job evaluation[16]. The *Act* requires jobs to be evaluated on the basis of rationally and consistently applied principles that are free of gender bias and which meet the statutory criteria. This obligation may be met by the use of formal job evaluation or through some other comparison system. In this case, the Employer's system was a point factor job evaluation system. The Regional Municipality distinguished between traditional job evaluation and job evaluation it wishes to use for pay equity purposes. Traditional job evaluation is used to explicitly define goals and values of management and then record and reward them based upon prevailing marketplace wages[17]. In contrast, job evaluation for pay equity purposes is designed to identify and close the wage gap where salary differentials are a function of gender and not job requirements, and thus is designed to eliminate gender bias and wage discrimination.

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12 Evidence of Dr. Armstrong, Mr. Delaney.

13 Shepela and Viviano "Some Psychological factors affecting Job Segregation and Wages" in Remick *Comparable Worth and Wage Discrimination*, Temple University Press,Phildelphia at p.47.

14 R.Steingberg and L.Haignere, "Equitable Compensation: Methodological Criteria for Comparable Worth", in C.Bose and G.Spitze *Ingredients for Women's Employment Policy*, State University of New York, 1987 at p.163.

15 Ronnie Steinberg, "Social Construction of Skill "*Work and Occupations* May 1990, State University of New York Press at p.183

16 *Women's College Hospital* (1989), 1 P.E.R. 53 at page 67

17 D. Schwab, "Job Evaluation and Pay Setting Concepts and Practices" in *Comparable Worth: Issues and Alternatives* ed. E.R. Livernash, Washington D.C: Equal Employment Advisory Council, 1980 at page 76. See also H. Remick, "Major Issues in A Priori Applications" in *Comparable Worth and Wage Discrimination*; ed. Remick, Temple University Press, Philadelphia, 1984

21. The *Act*'s purpose is to redress the systemic discrimination built into existing compensation practices. If the skill, effort, responsibility and working conditions are required in the normal performance of the work, they must be of value to the organization whether or not those requirements have been consciously recognized or previously valued by the Employer. They must be identified, recorded and valued in order to meet the requirements of the *Pay Equity Act, 1987*. Section 4(2) specifies how systemic gender wage discrimination shall be identified:

> Systemic gender discrimination in compensation shall be identified by undertaking comparisons between each female job class in an establishment and the male job classes in the establishment in terms of compensation and in terms of the value of the work performed.

Section 5(1) requires:

> For the purposes of this *Act*, the criterion to be applied in determining the value of work shall be a composite of the skill, effort and responsibility normally required in the performance of the work and the conditions under which it is normally performed.

22. These statutory requirements provide guidance in determining how to assess the gender neutrality of a proposed comparison system. The object of section 5 is to determine the value of work to be compared using the statutory criteria. Parties in negotiating the system, have the flexibility to fashion a comparison system to meet their needs. However, as a starting point, they are required to ensure that each component which forms part of the comparison system is gender neutral. Bias in one means the system as a whole is not gender neutral. Gender bias must be eliminated from all parts of the comparison system.

23. Mr. Delaney of Mercer described the system developed by his firm for this workplace. It consists of a questionnaire which uses predetermined compensable factors to simultaneously collect and value information. The weighted value of each factor relative to other factors is a key part of the system. The consultant writes the language and selects factors to measure job content from job classes across the establishment. The levels in each question measure requirements in increasing order of complexity; the consultant establishes the levels by equating particular types of job requirements at the same level of complexity or difficulty. Mr. Delaney testified that this questionnaire is a communication by the employee to the job evaluation committee about the content of their job, and is also a communication to the employee on what scale the Employer is valuing their job. The job evaluation committee receives the questionnaire and assigns composite point weights; it can seek additional information through desk audits or request an incumbent to attend committee meetings. Mr. Delaney indicated the importance of the committee being representative of women and men, management and union as well as a range of job classes in the establishment.

### *COLLECTION OF JOB INFORMATION*

24. Having carefully considered the evidence and submissions in this case, we find that the parties have an obligation to ensure the collection of job content information meets the requirements of the *Act* to accurately identify skill, effort, responsibility and working conditions normally required in the work of both the female job classes in the establishment and the male job classes to be compared. Not only is this a necessary condition of a gender neutral comparison system but we also find that section 5 of the *Act* requires a standard of correctness, that is, the skills, effort, responsibility and working conditions must be accurately and completely recorded and valued.

25. We note that the evidence of the Employer's experts was inconsistent with respect to the necessity of accurate information collection. Mr. Delaney on behalf of the Employer testified that the methodology must collect the most accurate job content information possible in order to measure its value; he cautioned that correct choices of compensable factors and weights will not prevent failure if the information collection processes are faulty. In contrast, Dr. Scarpello testified that it is not necessary to capture all job content, that the organization can choose what job content to collect so long as male and female job classes are measured by the same standard. However, the section 5 standard of correctness and completeness makes Mr. Delaney's assessment more appropriate to the Ontario statute. We also concur with Dr. Ames and Dr. Armstrong that it is essential that there be reliable, accurate, and valid empirical data on job content requirements.

26. Based upon the evidence in this case, the Tribunal finds the following considerations helpful in assessing the gender neutrality of the collection of the job information component of the comparison system:

- What is the range of work performed in the establishment?
- Does the system make work, particularly women's work, visible in this workplace?
- Does the information being collected accurately capture the skill, effort and responsibility normally required in the performance of the work and the conditions under which it is normally performed for both the female job classes in the plan and the male job classes to be used for comparison?
- Is the job information being collected accurately and consistently, the same way for each job class to be compared?

***What is the range of work performed in the establishment?***

27. There was no dispute that a comparison system must consider the establishment to which it will be applied. Dr. Ames and Dr. Fay testified that the comparison system must look at the organization in terms of the type and range of job functions, nature, culture and goals, and that the mechanism to collect information on the work must be sensitive to the range of work performed in the establishment. We agree; it is important that whatever comparison system is proposed by parties for pay equity purposes, consideration must be given to the establishment to which it will be applied. This requires looking to the nature of the organization, the services it provides or the products it produces. The system must specifically address the range of work performed by female job classes in the establishment so that it can identify systemic wage discrimination. We find both the Employer and the Union in this case considered the need to have a comparison system appropriate to a municipal workplace. However, the appropriateness of the system to the range of work in the establishment was not at issue; rather the issue before us was its appropriateness for the nurse job classes.

***Does the system make work, particulary women's work, visible in this workplace?***

***Does the information being collected accurately capture the skill, effort, responsibility and working conditions of all female job classes and the male job classes to be compared?***

28. These indicators are interwoven, but both are critical to a gender neutral comparison system. The requirement to make women's work visible is a vitally important part of the requirements to accurately capture the work performed. Since the *Act* is specifically addressed to the historical undervaluation of women's work, special attention must be paid by the parties to making visible those aspects of women's work which have been unrecognized. Given that most women and men perform different jobs, with different skills and job content characteristics, one of the initial and key requirements of a gender neutral comparison

system is to make visible those job characteristics, using the statutory criteria, that were previously not visible and thus not valued. The system must account for and reflect the differential job characteristics of both male and female work and positively value them. The parties negotiating a comparison system, must determine how to best capture the job requirements and the value of the work of the job classes to be compared. A comparison system for pay equity purposes must gather or collect job content information to be able to assess the skills, effort, responsibility and working conditions normally required in the performance of the work. The system must capture and value the work that is required, so that the Employer can meet the requirement to pay equitably for it. We are persuaded that to do anything less, would be to perpetuate systemic wage discrimination. We are not suggesting that any factors in a comparison system should value work unfairly, rather, the *Act* requires parties to cast their minds to the reasons that women's work has been required work but has not been recognized or valued by the organization. As Steinberg and Haignere[18] write:

> If jobs are described incompletely and inaccurately on a systemic basis, existing specifications become nothing more than job-content based justifications for perpetuating undervaluation of female dominated or significantly minority jobs.

29. Steinberg and Haignere's work is helpful in summarizing the type of job content the Tribunal will assess in this case in determining whether a proposed gender neutral comparison system will capture the value of work required in female job classes. Their list of frequently overlooked job content in female jobs includes: fine motor skills like rapid finger dexterity, special body co-ordination or expert use of fingers and hands; scheduling appointments and co-ordinating meetings; record keeping and filing; reading forms; writing standard letters; protecting confidentiality; working office machines; cleaning up after others; sitting for long periods of time; time stress; communication stress giving emotional support to distressed or ill people; stress from distractions and irregular work demands, from concentration, from dealing with chronically or terminally ill persons; working with constant noise; working in an open office setting; answering questions and complaints from the public; responsibility for patients or residents of institutions; the degree to which new or unexpected problems on the job arise; and damage to equipment from a mistake[19].

30. Similarly, the Pay Equity Office published a list which identifies frequently overlooked aspects of women's work:

> **SKILL:**
>
> - operating and maintaining several different types of office, manufacturing, treatment/diagnosis or monitoring equipment;
> - manual dexterity required for giving injections, typing, or graphic arts;
> - writing correspondence for others, and proofreading and editing others' work;
> - establishing and maintaining manual and automated filing systems, or records management and disposal;
> - training and orienting new staff;
> - dispensing medication to patients.
> - deciding the content and format of reports and presentations to clients.

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18 Steinberg and Haignere *supra*, at page 166
19 *ibid*, at page 168

**EFFORT:**

- adjusting to rapid changes in the office or plant technology;
- concentrating for prolonged periods at computer terminals, lab benches and manufacturing equipment;
- performing complex sequences of hand–eye co–ordination in industrial jobs;
- providing service to several people or departments, working under many simultaneous deadlines;
- developing work schedules;
- frequent lifting (office or medical supplies, retail goods, injured or sick people).

**RESPONSIBILITY:**

- caring for, and providing emotional support to children, institutionalized people;
- protecting confidentiality;
- acting on behalf of absent supervisors;
- representing the organization through communications with clients and the public;
- supervising staff;
- shouldering consequences of error to the organization;
- preventing possible damage to equipment;
- co–ordinating schedules for many people.

**WORKING CONDITIONS:**

- stress from noise in open spaces, crowded conditions; and production noise;
- exposure to disease and stress from caring for ill people;
- dealing with upset, injured, irate or irrational people;
- cleaning offices, stores, machinery, or hospital wards;
- frequent bending or lifting of office or medical supplies, retail goods, injured or sick people or children;
- stress from answering complaints;
- long periods of travel and/or isolation[20].

31. Steinberg also concludes that the invisibility of women's work may extend beyond the failure to record job tasks to the alternate forms of organization of women's work[21]. For example, women often work in co–operative team structures rather than in managerial hierarchies. We find this research helpful in understanding pay equity. Both the requirement to collect accurate job information as well as the requirement to give value to the alternative ways in which women's work is organized are key to making women's work visible.

32. In our consideration of whether the comparison system makes women's work visible, we note that both parties led a considerable amount of statistical evidence to bolster their cases. The experts for both parties were clear, informative and understandable in their explanations of current competing theories of the use of statistics in compensation practices. With the greatest respect however, we do not find statistical analyses are tests of gender neutrality. As the evidence clearly indicated, statistics are a product of their underlying assumptions, both in type of analyses used and in interpretive approaches, and the experts in this case spent considerable energy outlining their professional disagreements. Opinions as to the accuracy or

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20 Pay Equity Commission, *Implementing Pay Equity in the Workplace, Toronto.*

21 R. Steinberg, "Social Construction of Skill" *supra* at p. 13

appropriateness of t-tests, chi square tests, Hotellings $T^2$, cross tabulations and regression analyses are in our view legitimate interdisciplinary professional differences. In this case, we find that the statistical evidence is of limited use to our determination of the issues.

33. This is not to suggest that statistics have no relevance in the pay equity process. Parties are entitled to use such tests in order to assure themselves of the efficacy of their bargaining proposals or to test the gender neutrality of another party's proposed system. At best, the statistics may guide parties on where to look for problems in the system; for example, to test whether sufficient numbers of women are answering questions at higher levels of a questionnaire; to assess the clustering or incongruity of male and female responses; or to analyse the differences between incumbent responses and committee decisions. Such tests can begin to indicate where the system may not identify and value the work requirements of the job classes. The actual conclusions and decisions drawn from the statistics are part of the dynamic and negotiated process which must take place between parties to a pay equity plan. As the expert evidence confirmed, often quantitative analysis neglects to collect or make visible women's work. In utilizing quantitative analysis, it is not enough to merely change the language of the system to non-sexist language, rather the system must be gender neutral. Dr. Armstrong points out that some of the information that is crucial for understanding women's work is lost in statistical analysis and she concludes:

> The inadequacy of numbers as an aid to gaining a full understanding of the position of women is camouflaged by researchers' references to 'scientific' methodology, by the adoption of non-sexist language, by the use of similar questions for both sexes, and by the tabulation, according to sex, of most data. But for the most part, women and men do different work, in different places, for different pay ... assumptions may serve to conceal or distort important aspects of women's work[22].

34. The expert evidence led by both parties confirmed that the best source of information on the job requirements are the incumbents of the jobs. Dr. Fay testified that the accuracy of data collected is likely to be greater if the job incumbents rather than the committee provide the information and draw inferences regarding the appropriate factor levels. The Tribunal concurs. The incumbents are the people most familiar with the skills and requirements of their work, including both the detail and complexity required. The greatest accuracy is achieved using information gathered from those doing the work[23]. Since section 5 imposes a standard of accuracy, correctness and completeness, job information which is not accurately collected, is not valid for purposes of the *Act*.

35. We find that the comparison system must strive to ensure incumbents can consistently and accurately report upon their work requirements. The comparison system must be able to collect and record information about the job content requirements of both the female job classes and the male job classes to be compared. It must gather the data in accordance with the statutory requirements, consistently across all the job classes to be compared, and the system must undertake this in a way that is gender neutral. That is not to suggest that each task must be recorded, rather, as the *Act* specifies, there must be accurate collection and valuing of the skills, effort and responsibility normally required in the work and the conditions under which it is normally performed. The *Act* does not direct how parties might accomplish this, and we note that there

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22 P. Armstrong and H. Armstrong, "Beyond Numbers: Problems with Quantitative Data" *The Epistemology of Gender*, 1984 revised paper from *Alternate Routes* 1983 at page 54

23 see also L. Haignere and B. Fisher, "Report on the Suffolk County Supervisor Incumbent Analysis", Centre for Women in Government, Albany, New York 1987.

are a variety of ways, including, interviews with incumbents, questionnaires, or through sampling or testing to find explicit and hidden gender bias. Whatever they negotiate, parties must assess whether the answers given will collect information on the actual work required, and will not just be a function of the way men and women describe their work, the invisibility referred to above.

36. At a minimum, parties should look to whatever independent or objective standards are available. In this case, an independent measure of required skills was available in the "Standards of Nursing Practice" by the College of Nurses which licenses and regulates nurses. In assessing whether the system will capture the nurse job requirements in this case, we also found the evidence of Karen Boughner, a public health nurse particularly helpful; as well as the written joint responses to the Employer's pilot developed by four ONA members; the actual pilot questionnaires answered by ONA nurses in this establishment; and the evidence of Joyce Dewitt, a nursing supervisor for a non-ONA unionized Home for the Aged in this establishment.

37. The main tool used by the Employer's comparison system to record the work is the job analysis questionnaire. The questionnaire performs two functions in this case. It is the tool to collect job content information and it is the mechanism which determines value. We will consider the ability of the questionnaire in its final form, to accurately collect job information. Having weighed the evidence, the Tribunal finds that the Regional Municipality's comparison system and in particular the questionnaire, does not make visible the work of the nurse job classes in this establishment. The comparison system does not capture the nurse's job content accurately and completely as required by section 5. We made this finding by analysing each sub-factor of the questionnaire. Given that parties had no prior guidance on making this assessment, our goal is to assist, not to condemn parties in their continued efforts to agree upon a system.

*Skills Required:*

38. The Regional Municipality submits that the following sub-factors form part of the "skills" information required to be collected and valued by the *Act*: reading skills, writing skills, numeric skills, oral communication skills, education, experience, manual and dexterity skills, analytical reasoning skills, financial skills, equipment and innovation.

39. With respect to "Reading Skills", we find that the job requirements of these female job classes are collected. The questionnaire was amended to include patient charts and case histories. The questions posed have sufficient clarity to allow nurses to respond to such job requirements as understanding and applying legislation, the requirement to keep current with nursing journals and other medical and administrative documents. We find that as long as nurses filling out the questionnaire understand that they are to check the highest appropriate level, the complexity of the reading skills of their job class will be collected.

40. We also find that the "Writing Skills" sub-factor allows the nurses to record their skill requirements. The questionnaire was modified to add the skill to write nursing or health care information. The question records skills "to communicate social, political or other complex information and the skill to write or modify texts to persuade or influence"; all of which may be considered part of the writing skills of the female job classes in question.

41. With respect to the "Numeric Skills" question, we find that the sub-factor does not collect the skills of the nurses. The evidence was that both the public health nurses and Home for the Aged nurses collect and analyze statistical data; specifically they construct, read and interpret graphs in order to make their own

treatment decisions, to report on their activities, and to give a statistical base in which to undertake programme planning. The questions as phrased do not collect the skill requirements of these female job classes.

42. With respect to "Oral Communication Skills", we find the sub-factor does not adequately collect or make visible the skill requirements of the female job classes. The evidence of the bargaining unit nurses was that they could not locate their communication skill requirements on the questionnaire, and the pilot results confirmed this. The sub-factor does not collect communication skills required to deal with seriously ill or infirm patients, those in drug induced states or low functioning clients. It does not collect skills required to deal with clients who are in crisis, and with their families. Ms. Boughner's evidence confirmed that she was unable to locate communication skills required to rapidly switch levels of sophistication and to use several skills in one transaction; for example, talking to an Alzheimer's patient or suicidal teenager, then the family members, the lawyer and other health professionals. The questionnaire does not collect the skills required in counselling; for example, encouraging or persuading a client or patient to follow a particular programme. It does collect the skill requirements to communicate when there are language barriers. We also accept the testimony of Ms. Boughner that the "non-verbal" communication skills required in her job could not be found in the questionnaire; specifically the need for patience, caring and listening skills in dealing with patients or grieving families. Ms. Dewitt's evidence confirmed the complexity of oral communication skills required.

43. We find the "Education" sub-factor is likely to capture the skill requirements of the nurses. Those answering the pilot appear to have located their level of education with ease at the community college/equivalent training or university graduation levels. We accept Ms. Boughner's concern that the question does not record ongoing requirements for nurses' self education to maintain the professional standards required of them, and we find that parties could choose to collect this information either in the reading skills question or education question. The "Experience" question in contrast, confuses the length of time it takes to meet the full requirements of the particular job, with prior experience required to be hired for the job. This was confirmed by the oral evidence. We leave this as a question for the parties to decide how to collect experience in a way that records experience more accurately and consistently.

44. The "Manual and Dexterity Skills" sub-factor does not adequately capture the requirements of these female job classes. Both the pilot responses and the joint response of the bargaining unit nurses confirmed that incumbents had difficulty locating their dexterity skill job requirements. Skills such as handling of newborns during assessment, use of health care technology, clinical work as public health nurses, applying sterile dressings and removing sutures, could not be located by the nurses and thus these skills were not collected. Manual and dexterity skills required in the use of a variety of audio-visual equipment are also not collected. The questionnaire does include the adjustment of delicate medical equipment; however, we do not find that this is sufficient to collect the manual and dexterity skills required in the work of these female job classes.

45. With respect to the "Analytical Reasoning Skills" sub-factor, we find that most of the nurses who completed the pilot were able to locate their skill requirements at the second highest level; that of "analyse complex information to evaluate and select most appropriate of established methods or techniques". The nurses testified with respect to the wide range of analytical reasoning they are required to apply in their work.

Based upon the evidence about skills that these nurses are required regularly to use, we find the sub-factor will likely collect their job requirements.

46. Most of the nurses who answered the "Financial Skill" sub-factor responded that it does not apply to them largely because it measures formal training already measured under the education sub-factor, rather than collecting the financial skills necessary for the work. The oral evidence of both Ms. Boughner and Ms. Dewitt indicated that there are financial skill requirements in interpreting and working within budgets to ensure high levels of service delivery. Public health nurses are also required to use financial skills to assist volunteer groups and organizations to construct and implement budgets. They must use these skills to plan and organize budgets of clients, balancing such costs as proper nutrition and at home services such as physiotherapy. We do not find those skills collected here or elsewhere in the questionnaire.

47. The "Equipment Knowledge" sub-factor remained unchanged from pilot to finalized version. Yet the pilot responses were inconsistent, indicating the nurses had difficulty locating their work requirements. The evidence of Ms. Boughner and Ms. Dewitt confirmed that the type of equipment knowledge and repair skills required for these female job classes is not collected in this question.

48. We find that the "Innovation Skills" sub-factor fails to collect or make visible the job requirements of the nurses. Most of the levels are directed exclusively to innovation with respect to departments or divisions of the Regional Municipality's organization, collecting managerial and organizational innovation. It fails to collect required skills in innovation in the design and implementation of public health programmes; innovative modification of client and patient procedures; or the development of new and more efficient procedures in services nurses provide to the public.

49. In sum, we find that although the skill sub-factors collect some, they fail to accurately and completely collect and make visible all the skills required in the work of the female job classes. The wording of the skills sub-factors focuses upon managerial and administrative skills, and does not identify or collect the skills of the nurse job classes, specifically in oral communication, numeric skills, manual and dexterity skills, financial skills, experience, equipment knowledge and innovation skills.

*Responsibility Required:*

50. According to the Regional Municipality's proposed comparison system, the following are the responsibility sub-factors: planning, co-ordination, problem solving/complexity, financial responsibility, supervision of others, supervision received, inside contacts, outside contacts, and impact of error.

51. We find that the "Planning Skills" sub-factor fails to collect or make visible the planning responsibility requirements of the nurses in these bargaining units. The planning skills required for nurses include planning presentations and educational sessions with large and small groups covering a broad age range in both classrooms and community settings; assisting clients with family planning, responsibility for planning objectives and goals for a widely varied client population; responsibility to plan public health programs to meet statutory requirements or government directives; and the planning of individual work loads on an ongoing and regular basis. The oral evidence is reinforced by the fact that all the nurses answered the pilot question at all different levels, some making margin notes to illustrate what planning requirements are not collected. The planning skills measured by the questionnaire are directed entirely to administrative management skills; to "departments, divisions, functional areas", and to "corporate

strategies". As the evidence indicated, there is no room to measure or record planning for patients needs, or to recognize that these are components of the work required. The question as posed, also requires that planning skills must be those which set schedules or priorities in advance of performance of the work and thus fails to make visible the continual planning and revising which nurses must undertake to meet changing client needs. We note that these skills are not identified or collected elsewhere in the questionnaire.

52. With respect to "Co-ordination Skills", although the sub-factor specifies that co-ordination could be with respect to members of the public and control of people, on balance we are not persuaded that the question captures the co-ordination skills required for these female job classes. Pilot responses were at all different levels. The joint response of nurses reported that in their view the question had a management bias. The four nurses believe the sub-factor failed to collect the co-ordination skill requirements of their jobs including case management, public relations and co-ordination of volunteer organizations external to the Regional Municipality. The skills collected in this sub-factor are co-ordination "of other staff or people", reflecting hierarchical co-ordination over people working under the direction of someone. In contrast, a key nursing responsibility is co-ordination of efforts with other nurses and health care professionals over whom the nurse does not have managerial control, in order to accomplish the work required.

53. With respect to the "Problem Solving/Complexity" sub-factor, on balance we find this question does collect the information on problem solving/complexity required. Most of the evidence indicated that nurses undertake fairly complex problem solving, and accurate judgements are a regular part of their job requirements. Most of the nurses answering the pilot located their responsibilities at the second highest level, that of "problems are difficult to identify, facts may be insufficient or misleading. Extensive inquiry or research may be necessary, which may extend to unrelated work areas. Solutions require integration of information and considerable independent judgment."

54. The "Financial Responsibility" sub-factor was marked by several nurses in the pilot as "does not apply". However, the evidence we received from Ms. Dewitt and Ms. Boughner suggests that these job classes do require an understanding of budgets, including responsibility to make programme and equipment recommendations. We find that the nurses were unable to locate these financial responsibility requirements in the question and thus the system does not collect this aspect of their work.

55. With respect to responsibility for the "Supervision of Others", we find that the question does not accurately collect the job information of these female job classes. The nurses in the pilot test responded at all different levels from "does not apply" to the highest level, indicating that they could not locate their job requirements. The choice of sub-factor language records and credits supervision and skills often associated with job classes in a management capacity, specifically relating to direct supervision and training of staff. As Ms. Boughner, a bargaining unit nurse testified, the question does not recognize other kinds of supervisory skills that are not of a traditional manager/employee nature. It does not make visible such job requirements as supervision of other health care workers, of clients and of volunteers, and supervisory responsibility on night shifts or during the absence of the head nurse; skills that are not credited here or elsewhere in the questionnaire. Thus the sub-factor fails to make visible the way in which the nurses' work is organized and the alternative forms of team leadership and supervision required in the work of the female job classes in these bargaining units.

56. The "Supervision Received" question, posed a different sort of difficulty. Although our assessment is that the wording appears to be sufficient to collect the job requirements, we find the pilot responses by nurses indicate they were having difficulty locating their work requirements. Ms. Boughner testified that much of the day to day decision making was without supervision. She testified that supervision that is received is a "team accountability" supervision with regular strategy and reporting sessions, and that she was unable to locate this form of supervision received in the sub-factor. We find that some investigation is required to ascertain why the relevant responsibility requirement is not being collected in this sub-factor.

57. With respect to the sub-factor of "Internal Contacts", we find the same difficulty. The sub-factor as worded appears to collect job requirements. However, again the nurses answered at very different levels, and this indication that their job requirements are not being collected was confirmed by the oral evidence. Interpersonal contacts in nursing work include emotional responsibility for patients and clients, those contacts are often the core of nursing work and are not made visible here. We find that the Employer should have inquired as to the reasons for the varied responses in the pilot. It did not, and the question remained the same from the pilot test to the finalized version. The "Outside Contacts" sub-factor of responsibility was only marginally changed from the pilot to final version, adding "clients" and "media" to the second lowest level. Yet pilot responses indicate that the nurses had a great deal of difficulty locating their jobs, responding at a wide variety of levels. In one case, the nurse answering the pilot changed her mind four times with respect to where her job requirements might fall. Based upon this and the oral evidence we received, we find that this sub-factor fails to collect the requirements of these female job classes to include contacts with respect to socially or politically delicate issues such as AIDS programmes, sex education and family planning. It also does not record responsibility for outside contacts with other service agencies and organizations.

58. The "Impact of Error" sub-factor was added to address some of the nurses concerns, and we find that this additional sub-factor does collect the job information. The Standards of Nursing Practice require nurses to acquire and maintain nursing skills to respond to perhaps infrequent but crisis situations in which the possibility of error could have serious consequences, be it such situations as cardiac arrest or elderly people choking. Also, the evidence indicates that a registered nurse working at night in the Homes for the Aged may have to adjust medication or deal with emergencies with no doctor or director of nursing available. As Ms. Dewitt's evidence illustrated, a nurse in the Homes for the Aged is in charge of patient care and must monitor or observe changes in condition. Based upon her knowledge, she must respond appropriately and the impact of an incorrect response could vitally affect the health and safety of patients. The infrequency or irregularity of these demands must be recorded, but so too must the requirement to maintain these skills as part of their job requirements. We note that the negotiation of this sub-factor is illustrative of the potential for positive pay equity negotiations. Since job information collection must be accurate and since incumbents are the best source of that information; serious negotiation for changes to more accurately collect job requirements could produce an effective comparison system. Unfortunately this did not occur between these parties beyond a small number of sub-factors.

59. In sum, we find that the Municipality's comparison system fails to accurately and completely collect and make visible the following parts of responsibility requirements of the nurses: planning skills, co-ordination skills, financial responsibility, supervision of others, supervision received, internal and external contacts.

*Effort Required*:

60. The Employer's comparison system includes two sub-factors under effort; mental/visual effort and physical effort. The Tribunal finds that the effort requirements of the female job classes are not accurately collected in these sub-factors either individually or in combination. Although the addition of "people"to physical effort was important, it did not adequately address the fact that the pilot responses were inconsistent, and that the nurses expressed concern that they had difficulty answering the questionnaire. In the evidence presented, the nurses cited a number of effort requirements not collected, such as production requirements of numbers of visits per week; fatigue relating to ongoing assessments of clients in home visits; mental and visual effort required in a nurse's job which is not recorded by the "monotony" focus of the sub-factor.

*Working Conditions Requirements*:

61. The Regional Municipality's comparison system includes two working conditions factors: "Working Conditions" and "Exposure to Stress and Risk". With respect to the working conditions sub-factor, we are satisfied that the amendments made by the Employer in adding "potentially dangerous people" and "exposure to objectionable substances" assists these female job classes in locating their working conditions in the sub-factor. This additional factor allows nurses to record objectionable working conditions such as excrement, vomit and open wounds, as well as exposure to hazardous viruses, hepatitis B and other communicable diseases. It should also collect the need to adjust to a variety of working environments continuously, which is a job requirement of the public health nurses. The Employer also added the working conditions sub-factor of "Exposure to Stress and Risk". We find that the stress sub-factor will likely capture the physical, emotional and psychological stress associated with dealing with both the physical aspects of death as well as the emotional aspects in providing support to families. It will collect the stress of dealing with patients on a regular basis in the Homes for the Aged and in dealing with clients in crisis within the public health system. We find the working conditions requirements are likely to be collected by the questionnaire.

62. In sum, we find the comparison system in this case does not make visible nurses' work in the establishment. It fails to accurately collect and thus fails to value job content information, and the system does not provide a means to analyse and then rectify deficiencies. Section II of the questionnaire asked incumbents to list job content not measured in the rest of the questionnaire, and it identified deficiencies in collection of job requirements. It is unfortunate the Employer chose not to take the section II responses into account, because they indicated major problems in making visible health care work in this establishment. We find that the Employer did not inform itself about the nurses' work through these responses or through any other efforts. We also find that the script drafted by the Employer, to be read in administering the questionnaire, does not cure the deficiencies in this respect. The script, although helpful, does not explain the purpose of the pay equity process and does not give employees specific information on how to record their job requirements in a way which will make them visible. While some of the sub-factors will adequately

collect the skill, effort, responsibility and working conditions of the female job classes in these bargaining units, we find many other sub-factors are clearly deficient. In large measure, we find this failure to collect the job requirements the end result of the inadequate negotiation process which took place between these parties.

***Is the information collected accurately and consistently?***

63. We find the Employer's proposal to use a closed-ended questionnaire a good one. A closed-ended questionnaire is one which frames the questions in such a way as to elicit more consistent and comparable responses, minimizing the impact of gender and linguistic differences. As the Regional Municipality submits, this format has been recognized as superior to open-ended questionnaires which often collect extraneous information related more to personal abilities, perception and gender of incumbents than the actual job requirements. We also find the Employer's removal of supervisory review of the questionnaires, to allow for anonymity of incumbent responses, to be an important step. It may be that incumbents who do not fear reprisal from their supervisors are more likely to give accurate job information than those concerned about the reaction of their supervisors.

64. The questionnaire must use language that is understandable to employees. This requires not only clarity and non-sexist language, but also wording that allows incumbents to properly recognize and report the skill, effort, responsibility and working conditions required in their work. Women and men tend to use different vocabulary in describing their work, which can affect the value placed upon their work. Women tend to use verbs that are softer or weaker, down-playing the action or activeness. We concur with Dr. Ames' evidence that parties should assure themselves that answers given are not a reflection of gender, education, class or ethnic background, but rather, that those responding have understood the questions and have answered them. The comparison system must be analyzed to ensure wording of any sub-factors selected is gender neutral.

65. In this case, we find that there are comprehension problems in the questionnaire. For example, each level measured frequency and complexity simultaneously. As the evidence indicated, given that an incumbent could only respond to one level, often the frequency and complexity were not paired to accurately reflect the work. The language was also not accessible. For example, much of the language uses relative terms such as "smaller" or "more frequent" with no reference point as to smaller or more frequent than what. Without some grounding, either task based, or reference points for words which imply a comparison with something else, the responses to the questionnaire are likely to be inconsistent and invalid. The Pay Equity Office recommends that relative terms such as frequency, should contain fixed points of reference such as 3 hours per week or 2 times a month as a means to accurately and consistently collect job information[24]. Such a technique would have improved the collection of job information for this comparison system immeasurably.

66. Dr. Ames, a specialist in questionnaire construction, testified that because the questionnaire had an unnecessarily complex sentence structure, answers to questions which cannot be understood by incumbents will be random, inaccurate and increase the possibility of both error and gender bias. Dr. Fay testified that the questionnaire was "not an easy read" but that accessibility was a price to be paid to have the questionnaire applicable to a wide range of jobs. We find that there is a need for the employee to readily understand and accurately interpret the questions in order for the comparison system to accurately and comprehensively record and value job requirements. Where there is considerable variance in questionnaire

24. *Pay Equity Commission*, supra

responses for the nurses in the same job class, it is likely there is comprehension difficulty, thus warranting some investigation. We note that Ms. Dewitt's scores on the questionnaire were consistently higher than the nurses participating in the pilot. Ms. Dewitt testified that she had filled the questionnaire out six times and that she relied upon both her first hand knowledge of the job and a number of job evaluation courses she had taken. We find this illustrates that some of the comprehension difficulties might be cured by more training of incumbents prior to filling out the questionnaire. Incumbents must be able to find their job requirements within the questions posed.

67. The Tribunal received a great deal of evidence on how parties can verify if information is collected consistently. Once the comparison system has met the initial requirement to accurately collect the skill, effort, responsibility and working conditions requirements of the job classes to be compared, the comparison system must be applied in a consistent way. Dr. Fay testified consistent application was a requirement of any effective comparison system. However, the Union submitted consistency will only address a certain portion of gender bias, that implicit in a consistency approach is the assumption that there are no differences between male and female work; it submits that a consistent application of a comparison system which ignores gender will not reveal wage discrimination.

68. The Tribunal finds that consistency is a necessary but not a sufficient requirement of gender neutrality. Consistently applying a system which does not accurately collect job requirements and which is not gender neutral will not achieve gender neutrality. Further, a consistently applied comparison system which leads to some wage increases to female job classes, does not in itself confirm for parties that the system is gender neutral. The requirement of consistency is a sequential one, and becomes valid only after the initial obligation of accurate and complete collection of job information is satisfied.

*DECIDING ON THE MECHANISM OR TOOL TO DETERMINE HOW VALUE WILL ATTACH TO THE INFORMATION*

69. The second component of a gender neutral comparison system, is valuing the information collected. A gender neutral comparison system must have a mechanism or tool to determine how value will attach to the information collected based upon the statutory criterion. At each step of the negotiation process, parties must endeavour to assure themselves that the system is gender neutral. Deficiencies in the collection of job requirements for example, cannot be cured by a valuing tool which effectively determines value; and in turn, a valuing tool which is so flawed that it ignores the statutory obligations, cannot be cured by accurate collection of job requirements.

70. This is a more complex part of the gender neutral comparison system and we appreciate that the parties had little guidance on how to ensure that they are determining the value of work in a manner which meets their statutory obligations. Selection of the tool or mechanism to value the work must be negotiated under section 14 as part of the gender neutral comparison system, yet sections 4(2) and 5(1) of the *Act* require parties to identify systemic gender discrimination by undertaking comparisons of the value of the work based upon the composite of skill, effort, responsibility and working conditions. The parties then, in negotiating a mechanism to determine value, must meet the *Act*'s requirements to identify systemic discrimination. We find that the value which attaches to the work is the joint decision of the parties. The Tribunal's role in this respect is to ensure that the process and content required by the *Act* are followed; and only in cases where parties have bargained to an impasse on specific value issues will we intervene to decide the most appropriate determination of value.

71. In this case, the parties negotiated for a mechanism to determine value but did not complete negotiations for the comparison system. Consequently, we will assess only those components in evidence and at issue before us. The evidence led persuaded us that the following questions would be helpful:

- Can the tool determine the value of the work performed using the statutory criteria of skill, effort, responsibility and working conditions?
- Is the choice of sub–factors, if used, undertaken free of gender bias?
- Are levels or equivalencies, if used, free of gender bias?
- Is the composite required by section 5(1) decided in such a way that gives value to all the statutory criteria and is point weighting free of gender bias?

***Can the tool determine value of the work performed using the statutory criteria?***

72. We find this requires that the mechanism or tool to decide value of the job information, attaches that value based upon the criteria of skill, effort, responsibility and working conditions. In this case, the questionnaire serves not only as the tool for collection of job information, but serves also as the decision making tool with respect to attaching value. The questionnaire is divided into sub–factors. Each of these sub–factors attach to one of the statutory criteria, as discussed above. Each level of each question or sub–factor response is assigned a point value, and each sub–factor as a whole has a percentage weight attached to it. We find therefore, that the tool does determine a value of the work performed based upon the statutory criteria.

73. However, the Tribunal's enquiry does not end there. Section 4(2) specifies that systemic gender discrimination must be identified by undertaking comparisons of the job classes based upon the value of the work performed. This imposes an obligation upon the parties to pay equity negotiations to ensure that the value they jointly attach is gender neutral, addressing directly the requirement to identify systemic discrimination. We appreciate that this is not an easy process. Systemic discrimination by its very nature tells us that it is hidden, and neither overt or intended. However, we are persuaded that the parties can undertake such a process by examining the selection of sub–factors and the choice of levels or equivalencies, if used, to investigate if they are gender neutral.

***Is the choice of sub–factors, if used, undertaken free of gender bias?***

74. There are four statutory criterion required to be used in valuing work requirements. For comparison systems which are point factor job evaluation, the choice of sub–factors is an important part of establishing a means to sort and value the work performed. Treiman has found that the choice of sub–factors included in job evaluation can have very substantial consequences for the ordering of jobs with respect to their relative worth and hence relative pay[25]. Although sub–factors are not required by the *Act*, if as in this case, parties choose to propose them, they must recognize that there are sub–factors which are acknowledged to benefit female or male work. Some sub–factors value directly the skill, effort, responsibility and working conditions of male jobs and others those of female jobs, and yet others collect the value of work of both genders.

75. The choice of the sub–factors must be undertaken in a manner that does not create or maintain discriminatory valuing of the work requirements of female or male job classes. Parties must try to ensure

25 D. Treiman, "Effect of Choice of factors and factor weights in Job Evaluation" in H. Remick, *supra* at p. 88

each sub-factor identifies and values the particular job characteristics equitably for both female and male jobs to be compared. This will help parties to identify as much as possible at the front end of the process, any potential gender bias. This assessment is not definitive, because there will inevitably be sub-factors which favour some types of work, but such an exercise helps to identify where systemic discrimination can enter. The parties, in selecting sub-factors must strike a balance to ensure that all the job requirements for both female and male job classes are identified and valued as required by section 5 of the *Act*. Applying sub-factors the same way to female and male job classes does not necessarily result in gender neutrality if the sub-factors themselves already are gender biased. Parties to a pay equity plan are in the best position to ensure that selection of sub-factors presents a fair balance of criteria,and to ensure they value the work performed in such a way as not to favour female or male job classes. Where the parties are not in agreement, the Tribunal must weigh the evidence and balance the interests of the parties in assessing this component of the comparison system.

76. The Employer's evidence was that historically, sub-factors for job evaluation were constructed to replicate as closely as possible the existing wage hierarchy and thus also replicated any gender bias that might have existed in the establishment. It submits that its choice of sub-factors in this case was based upon the need to balance sub-factors which it viewed as favouring the work of male and female job classes. The Municipality added the sub-factors of "impact of error" and "exposure to stress and risk" in an effort to redress the imbalance in factors favouring male work. The questionnaire contains 24 sub-factors based upon skill, effort, responsibility and working conditions. The Union submits that there continues to be a substantial imbalance in the selection of sub-factors such that the comparison system can only favour male job classes in its result.

77. In this case, we find that the sub-factors do provide a range of possibilities for incumbents to identify and record job requirements of both nurse's work and the male job classes to be compared in this establishment, however the selection of sub-factors does not cure the serious deficiencies in accurate collection of job content information.

***Are levels or equivalencies, if used, free of gender bias?***

78. In this case, weighting is involved at two points in the process, the first is in setting levels and equivalencies, which constitute an initial weighting process. We find that the failure of this questionnaire to make visible the women's work of these job classes is further aggravated by the weighting already embedded in the questionnaire. In this case, the questionnaire not only collects job information but evaluates it simultaneously. Each question contains a range of levels of increasing difficulty or complexity, and each higher level is therefore assigned a higher value. The Employer's choices of equivalencies set an initial rather crucial hierarchy of value. No consideration was given to possible gender bias in setting that hierarchy of levels within the questionnaire. The ordering and valuing of the information has been done without an analysis of the current pay structure, or requirements of nurse's work in this establishment which need to be valued. The questionnaire asks those responding to rate themselves on a scale, at levels which are already pre-weighted and which establish a hierarchy of job content. Value judgments are already embedded, and we find that the Employer did not put its mind to the impact on the work of these female job classes.

79. It is precisely the weighting embedded in these levels or equivalencies that the Employer is required to negotiate with ONA and although there was considerable negotiation between these parties, they reached

an impasse. The Tribunal has jurisdiction to decide these issues once parties reach an impasse and seek a decision from the Tribunal; however, we find it more helpful in this case to alert the parties to concerns we noted, in order to assist the parties when they return to the negotiating table. As a result, we identify here only a couple of examples, based upon the evidence led, of how valuing through the setting of equivalencies may not properly value nurses' work. One example is the "Impact of Errors" sub-factor, in which "loss to the Municipality's prestige" is two levels higher than "may result in serious injury to others". Another example is in the "outside contacts" sub-factor, in which contact with the media and publicity with respect to the image of the Municipality is seven levels higher than routine contact with patients. The structuring of values is such that the jobs with formal managerial responsibility are to score at the highest levels. The initial weighting by equivalencies consistently reflects and values formal supervision as opposed to the alternate ways in which nurses' work is organized. In part, the difficulties in assessing the equivalencies arise because the nurses' work has not yet been accurately collected, and thus cannot yet be valued. When the job requirements are collected and made visible, they must also, in a questionnaire such as this, be placed at the appropriate levels to value their work in a gender neutral manner.

80. The parties must negotiate these equivalencies to remove as much gender bias as possible. We appreciate this process is difficult and at times may be irresolvable. Where parties cannot agree on a value, the Tribunal will resolve the impasse and decide value based upon first hand evidence of both female and male job classes, and upon any objective criteria or standards which may exist. In this case, we heard no evidence on the value of the male job classes to be compared and therefore will not make any further assessment on the equivalencies other than to direct parties to negotiate.

***Is the composite required by section 5(1) decided in such a way that gives value to all the statutory criteria and is point weighting free of gender bias?***

81. We find that a key part of the comparison system which parties must negotiate is the weighting given to the factors and sub-factors in the comparison system. The composite of the criteria as required by section 5(1) must correctly measure and value the skill, effort, responsibility and working conditions, and weigh them in such a way as to not unfairly advantage either female or male job classes. Since the *Act* recognizes that systemic biases have historically favoured the work performed in male jobs, the parties negotiating the comparison system must pay particular attention to ways in which the weightings effect female jobs as an indicator of hidden bias.

82. The Tribunal received considerable evidence regarding the implication of weighting in terms of the statutory requirements of gender neutrality. In this comparison system, the second part of weighting is the relative point values of the sub-factors. Bias can enter at this stage of the process as well, since decisions are not merely technical, but rather, value judgements are being made about equity between female and male job characteristics. Gender bias can be magnified through weighting procedures and parties must check to confirm whether high values given to particular job characteristics are justified or not. As part of negotiating how the comparison system will value the job requirements, parties must ensure such weighting is gender neutral, they must consciously evaluate whether the assignment of weights unfairly rewards or penalizes male or female job classes. Treiman's work demonstrates that weighting of sub-factors can have substantial

consequences for ordering the worth of jobs, particularly when sub-factors are highly correlated[26]. Dr. Ames stressed that the correlation of sub-factors, where different sub-factors value the same type of job content more than once, must be carefully analysed to ensure parties are not giving unfair value to male job classes when assigning point weighting. Haignere reports that it is difficult to weight job content if the invisibility of women's work is not identified earlier in the process; she also points out that it is a new and difficult challenge to weight job characteristics of women's work that have never been valued before[27].

83. We find that, although an analysis of weighting can and should help identify any previously hidden biases, in itself analysis at the weighting stage is not sufficient to meet the requirement of gender neutrality. It is part of the sequential process of checks and balances that parties must undertake at each step to ensure, as much as possible, that the system is gender neutral and that it attaches value in a manner which does not unfairly advantage male or female job classes. We find, in this case, the parties should have negotiated point weighting with a view to agreeing upon weights that value equally the female and male job requirements. Although the Mercer comparison system initially proposes a particular weighting of the sub-factors to arrive at a composite, we note with approval the Employer's evidence that it would negotiate these composites with ONA. Although evidence on the Canadian Union of Public Employees ("CUPE 2210") bargaining unit in this establishment was led, we do not find it appropriate to assess that composite weighting, since any negotiated results for one pay equity plan may not be appropriate for another. In this case, the parties have not yet negotiated a point value hierarchy for the jobs in these bargaining units and accordingly, we will not make a finding.

*APPLYING THE TOOL OR MECHANISM TO DETERMINE THE VALUE OF THE WORK*

84. In assessing the evidence, we find the following assisted us in assessing its gender neutrality:

- Is the valuing tool of the comparison system applied consistently without regard to the gender of the job class?
- If a committee is used to evaluate jobs, is it representative, balancing the interests of the parties with duties and obligations under the *Act*?
- If a committee is part of the system, is it sufficiently knowledgeable to enable the parties to meet their obligations?
- Is the decision making process accomplished in a manner free of gender bias?
- Did the mechanism identify systemic wage discrimination?

85. The *Act* does not require parties to utilize joint committees in the implementation of a gender neutral comparison system; however, where the system requires committees, the parties have an obligation to ensure that they contribute to, rather than detract from, the gender neutrality of the comparison system. In this case, the system includes a joint job evaluation committee to collect questionnaire responses, assign weights to the sub-factors, and apply the weights to the average responses to determine a point value for each job class. The Regional Municipality submits that consensus by the joint job evaluation committee is a key part of its comparison system. It submits that if the committee can agree, and it is composed of individuals representative of Union and management, men and women, representing a cross section of job classes, then consensus is as near a measure of gender neutrality as possible. The Union argues that the joint committee should not be a test of gender neutrality.

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26 D. Treiman "Effect of Choice of Factors and Factor Weights in Job Evaluation" ibid at p. 88, see also D.M. Werwie, *Sex and Pay in the Federal Goverment; Using Job Evaluation Systems to Implement Comparable Worth*, Greenvwood Press, New York, 1987 at p. 100

27 L. Haignere "Pay Equity Implementation"; Conference Paper, Centre for Research on Public law and Public Policy, Osgoode Law School, Toronto, 1990.

86. We find the submissions of the Employer persuasive, although we qualify them in part. If a representative group of people agree, hopefully as much potential bias as possible has been eliminated in the value judgements made in use of the comparison system[28]. However, we find that the parties must be alert to the fact that historical attitudes about the value of women's work can continue to operate in a committee situation regardless of representation. Consensus in and of itself does not necessarily eliminate traditional biases and stereotyped notions of women's work. Although members selected for a committee might be representative of jobs within an establishment, often they are also aware of the current salary hierarchy, particularly in a public sector workplace such as in this case. That awareness of salary levels often lowers the point values of a job class even when the job requirements are taken into account[29]. Mr. Delaney testified that it was possible to convince a committee that an unfair system was fair. This is reinforced in an article by Erica Szyszczak who commented:

> While such a (job evaluation) scheme looks attractive in giving an appearance of an objective scientific approach to defining the value of jobs, it is also recognized that it can conveniently disguise and reinforce sex discrimination. As with all aspects of the wage bargaining process, a job evaluation scheme relies upon a set of skills agreed between management and Unions and reflects the relative bargaining strengths not only between these parties but also between male and female workers themselves[30].

87. Joan Acker in her book on the Oregon comparable worth experience[31], documented the powerful nature of small group committee dynamics. She found that women's opinions were not taken seriously and that committee decisions disproportionately reflected men's consensus. Although the use of committees in the Ontario pay equity context is new, we find the American experience helpful in alerting parties to where gender bias may enter the committee process.

88. The committee works with the job content information collected and attaches a value to the information. If there are inaccuracies in the initial collection of information, a committee cannot adequately compensate without going back and accurately collecting all this information. For example, if the level of the sub-factor measures more than one task as it does in this case, the committee will have difficulty identifying which part the incumbent responded to. If all the previous requirements for gender neutrality have been met, this is not a problem; however, the committee process doesn't correct inaccurate information collected at the outset. We agree with Dr. Fay that the ability of the Committee to follow up with individual incumbents to obtain additional job information, is an important aspect of this system. However, parties are still obliged by section 5 of the *Act* to accurately collect the skill, effort, responsibility and working conditions normally required as the first component of the comparison system.

89. We find the Employer's proposal for an equally represented union nominated and management nominated joint committee, representative of both sexes and various job classes, to be a good one. Although we recognize that consensus of the committee is in itself not a test of gender neutrality, we find

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28 Steinberg and Haignere, *supra* at page 17 have also concluded that diversity of the representation with respect to race, sex, age, job and union background decreases the likelihood of system bias.

29 M. Mount and R.A. Ellis "Sources of Bias in Job Evaluation: A Review and Critique of Research", *Journal of Social Issues*, Vol. 4S, No. 4, 1989 at 156.

30 E. Szyszczak, "Pay Inequalities and Equal Value Claims" *Modern Law Review*, vol. 48, 1985, at page 144.

31 J. Acker, *Doing Comparable Worth*, Temple University Press, Philadelphia, 1988.

such representation assists in ensuring that a range of views are represented. Agreement on the valuing of jobs by representative committee members can help to reduce bias in valuing work. We also find that training of the committee is a key requirement. Where there is a job evaluation committee, it is essential that cthere be adequate training in bias-free evaluation and that members develop a conscious awareness of the attitudes and biases people bring to point valuing. Value judgements made by a committee untrained in identifying systemic bias, will likely preserve existing wage inequities through the undervaluation of female job classes[32]. In this case although the Employer relied upon the training used for its non-union and CUPE 2210 committees, it could not provide any details or specific training information on whether the training was aimed at bias free evaluation. Without commenting on those comparison systems, the Tribunal finds that the evidence of committee training proposed by the Employer was inadequate to assure us that value-weighting decisions would be made without gender bias. Given the Municipality's heavy reliance upon the committee as part of the system, this training would have to be more comprehensive.

90. In conclusion, while the Tribunal finds that consensus in the decision making process is an important part of acceptance of the pay equity plan, in itself it is not a guarantee of gender neutrality. Parties must satisfy the requirement for gender neutrality in all parts of the comparison system. Where consensus cannot be reached and parties cannot agree, they have recourse to the Pay Equity Commission, first to the Review Services process and then to the Hearings Tribunal. That process recognizes that while consensus and agreement are desirable, they are not always possible, in which case the *Act* provides a dispute resolution mechanism.

*MAKING THE COMPARISONS:*

91. This part of the comparison system requires that the female job classes be compared to male job classes to determine whether pay equity exists for each female job class as required by sections 12 and 14(2)(a). In this case, the female job classes in these bargaining units have not yet been compared to male job classes. Although the Regional Municipality urged us to assess the gender neutrality of this part of the comparison system based upon its application to other bargaining units in this establishment, we do not feel it is appropriate to do so. This component, like the others, must be negotiated with the Union. Choices in bargaining by CUPE 2210 may not be the same choices these parties would make. Accordingly, we will not make any findings on this part of the process.

92. In conclusion, we note that even if parties are to correct the deficiencies of the system identified in this decision, that is not necessarily a guarantee of gender neutrality in implementation. Pay equity is not a precise process. The *Act* is aimed at eliminating gender bias that can be identified, and directs parties to take affirmative action to narrow the wage gap. Gender neutrality must thus be assessed in both the design and the implementation of the comparison system to be used for pay equity purposes. The standard of gender neutrality is one which will further evolve as we acquire more experience in how decisions in collection and valuing of job content make visible and value women's work. In part, acceptance by all the parties to the negotiated pay equity process is one indicator, and the *Act* is structured in such a way as to reflect that. However, given the sequential nature of the pay equity process, and in particular, in the use of a comparison system, gender neutrality can and should be assessed at each step. The progressive elimination

32 Dr. Fay, see also Mount and Ellis, *supra*

of any potential gender bias during the stages of collection of job content, deciding and applying a tool to assess value, and making the comparisons, will work to ensure a more systematic, less subjective valuation of all work and particularly women's work, in its final application. Such a strategy is practical and achievable and best meets the purposes and implementation strategy of the *Pay Equity Act, 1987*.

### *The duty to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and pay equity plan*

93. We now examine the bargaining allegations. ONA alleges that the Regional Municipality failed to negotiate in good faith and endeavour to agree upon both a pay equity plan and a gender neutral comparison system. Specifically, the Union alleges that the Employer unilaterally hired a consulting firm and used the consultant as spokesperson in negotiations without agreement of the Union; that the Employer chose its system and had invested too much in it prior to negotiations to be willing to honestly bargain; that the Employer used the mandatory time frames as an excuse to by-pass its bargaining obligations; that it refused to recognize the bargaining agent; that it drafted the initial job questionnaire and pilot tested its system without agreement of the Union; that the Employer abdicated all responsibility to the Mercer consultant and failed to meaningfully negotiate with the Union; that the Employer refused to disclose significant information to ONA including the results of the pilot test, which prevented the Union from evaluating the Employer's proposals. ONA also alleges that the Employer planned to implement one comparison system across the Municipal Corporation without negotiating with the Union; and that the Employer failed to engage in rational discussion or to respond adequately to the Union's criticisms, questions or proposals.

94. The Employer denies that it failed to bargain in good faith or endeavour to agree upon a pay equity plan. It denies that it unilaterally adopted a gender-biased comparison system and submits that it retained the Consultant to provide advice to the Regional Municipality in meeting its obligations under the *Act*. The Employer submits that its communication with employees was not an effort to bypass its bargaining obligations and that its actions were an effort to meet the mandatory time frames. Further, the Employer submits that it did disclose the information it had available.

95. The Tribunal received considerable oral evidence from those directly involved in the pay equity negotiations: William McDougall, Organization Development Advisor; Jeff Cann, Director of Personnel Services; Noelle Andrews, ONA Assistant Director of Government Relations; Lawrence Walters, ONA Research Officer on pay equity; and Rhondi Brown, ONA Employment Relations Officer for these bargaining units. In this case, pay equity bargaining took the form of an exchange of correspondence, telephone calls and face to face negotiations.

96. The facts are as follows. In December 1987 the Employer advised the local ONA president that the Regional Municipality had engaged the services of William Mercer Ltd. by sending her a copy of a memorandum from Mr. McDougall to all department heads. The memo said that the Employer would contact the Union when it had "an action plan in place". The memorandum outlined the aspects of the plan that the consultant was already working on including preparing a needs study, developing common factor language that would provide the basis for job evaluation for all employee groups and developing a job analysis questionnaire to collect job content. The memo added that the procedure expected to be followed would include developing job descriptions based upon the questionnaire; and it advised that a system of job

evaluation, details to be provided later, was to be the subject of negotiations with the various groups. The memo contained no indication that the Union would be involved in any part of the initial process. In the early part of 1988, Mr. McDougall was contacted by Ms. Brown, the Employment Relations Officer for the provincial bargaining agent. She informed Mr. McDougall that the Employer was required to negotiate both the gender neutral comparison system and the pay equity plan with the bargaining agent, the provincial Ontario Nurses' Association.

97. In March 1988, the Employer wrote directly to the provincial bargaining agent, detailing its time schedule and the pay equity process it intended to follow. That time schedule set out dates from March 1988 to November 1989, specifying which actions the Employer would take with respect to pay equity and detailing when each action was to take place. The memorandum included a time frame in which the Employer would decide "establishment", activate a management senior staff committee to oversee job evaluation, take the Action Plan to Regional Council for approval, prepare and finalize the job analysis questionnaire, formalize bargaining unit committees, test run the questionnaire, give weight to the factors, administer the questionnaire, identify job differences, complete the job evaluation process in committee, have the consultant benchmark prices and identify pricing conflicts. Negotiations with the Union are set well into the time schedule after a number of steps are completed. The covering memorandum assured ONA that the Municipality was committed to keeping the bargaining agent informed of what was taking place in pay equity. ONA again contacted Mr. McDougall by phone in March 1988 and by written correspondence in May 1988 to inform the Employer that it was required to negotiate all parts of the pay equity plan with the provincial bargaining agent and that the Union had not agreed to any parts of the pay equity plan or the comparison system with which the Employer was proceeding. Subsequent to this, the parties had two face to face negotiating sessions, July 6 and August 26, 1988, as well as a continual exchange of bargaining positions in writing during the summer and fall of 1988. In November 1988, the Employer informed the Union it had closed negotiations, fourteen months prior to the mandatory posting date. It informed ONA on November 8, 1988 that it was proceeding to administer the system to the ONA nurses and all other employees in the establishment. Only when ONA informed the Regional Municipality on December 8, 1988 that it was complaining to the Pay Equity Commission did the Employer change its position and only administer the questionnaire to all non-ONA employees.

98. The *Act* requires that in an establishment in which any of the employees are represented by a bargaining agent, there shall be a pay equity plan for each bargaining unit. Section 14(2) requires the employer and the bargaining agent to negotiate in good faith and endeavour to agree before the mandatory posting date on the gender neutral comparison system used for comparing female job classes to male job classes to determine whether pay equity exists. The parties must also negotiate in good faith and endeavour to agree upon a pay equity plan for the bargaining unit.

99. Section 13 specifies that pay equity plans shall be prepared to provide for pay equity for the female job classes in each establishment and the *Act* requires that parties:

> shall identify the establishment to which the plan applies;
>
> shall identify all job classes which formed the basis of the comparisons using the gender neutral comparison system;
>
> shall describe the gender neutral comparison system used to compare job classes to determine if pay equity exists;
>
> shall set out the results of the comparisons;

shall identify all positions and job classes in which differences are permitted by subsection 8(1) or 8(3) and the reasons for relying on such subsection;

shall describe how compensation in all female job classes for whom pay equity does not exist will be adjusted to achieve pay equity;

shall set out the date on which the first adjustments will be made under the plan.

100. These sections identify what the bargaining duty is and what the parties must undertake in negotiations to meet their obligations under the *Act*. In parts of section 13 the parties together must identify the establishment to which the plan applies and all job classes which form the basis of comparisons; the *Act* provides definitions for these aspects of the plan. If parties cannot agree, they have recourse to the dispute resolution mechanism in the *Act*. In this case, the issue of establishment was decided by a previous decision of the panel (see *Haldimand–Norfolk* (No. 3)(1989), 1 P.E.R.17) and the issue of job class was not before us. Other parts of the section 14 bargaining obligation are subject to full negotiations between the parties, such as the requirement to negotiate the component parts of the gender neutral comparison system and endeavour to agree upon a pay equity plan. Once parties have agreed upon and implemented the gender neutral comparison system to determine whether pay equity exists, sections 13 and 14 of the *Act* require the parties to set out the results of the comparisons in the pay equity plan; to identify and give reasons on all positions and job classes in which differences in compensation are permitted by section 8(1) or 8(3); to describe how compensation will be adjusted to achieve pay equity, and to set out the date on which first adjustments will be made.

101. Counsel for the Respondent submitted that the *Act* clearly places paramount responsibility upon the Employer for the achievement of pay equity and relies upon that as defense for its actions in these pay equity negotiations. We concur that the Employer has the obligation to post the pay equity plan, and to meet the mandatory time frames. The Employer is also required to establish and maintain pay equity, and bears the financial responsibility to make any required wage adjustments to the salaries of workers in female job classes. Although this is an important obligation, the Tribunal finds that such an obligation cannot be taken as pre-empting the duty of the Union to also meet its obligations under the *Act*. The obligations imposed upon the bargaining agent under the *Pay Equity Act, 1987* are of equal importance. Section 7 requires that no employer or bargaining agent shall *bargain for* or agree to compensation practices that would contravene the requirement to establish and maintain pay equity. The obligations assume an equal partnership to the pay equity negotiation process and each party should make an effort to inform itself of its statutory obligations. Each party must meet its obligations to negotiate pay equity in a manner which does not interfere with or prevent the other party from meeting its statutory obligations.

102. The Tribunal must assess the *Act*'s requirements to negotiate in "good faith" and to "endeavour to agree". The *Pay Equity Act, 1987* recognizes that systemic wage discrimination exists. The *Act*'s stated purpose in section 4(1) is to redress that wage discrimination. The *Act* specifies the standards required to achieve pay equity; specifies the content of a pay equity plan; requires negotiation of the choice of comparison system and requires that system to be gender neutral; it requires the Employer to post the plan and sets out mandatory time frames. Finally, it requires a specific and measurable result, the achievement of pay equity. Where parties agree, section 14(5) deems the plan approved by the Pay Equity Commission. Where parties cannot agree upon the system and pay equity plan by the mandatory posting date, they are required to notify the Pay Equity Commission, and the *Act* specifies a dispute resolution procedure. The *Act* does not contemplate that parties will resolve an impasse by resorting to economic sanction. Given these statutory requirements, the nature of the inquiry by the Tribunal into the obligation to "negotiate in good

faith and endeavour to agree" will be one which examines both the substance and process of pay equity negotiations based upon the content, time frames and results required by the *Act*.

103. The Pay Equity Hearings Tribunal in assessing the disclosure obligation under the duty to negotiate in good faith has already alerted parties to this approach. In *Riverdale Hospital*, the Tribunal said:

> Section 14 of the *Act* imposes a joint obligation upon the employer and a bargaining agent to negotiate in good faith and endeavor to agree upon a gender neutral comparison system and a pay equity plan; such an obligation applies to both the process and to the content of pay equity negotiations. In bargaining the component parts of a job comparison system and a pay equity plan, the parties must meet the statutory requirements of the Act[33].

104. In *Cybermedix Health Services Limited* the Tribunal said:

> The *Act* imposes a joint responsibility on the Employer and the Union for both the process and the content of pay equity negotiations. Process refers to the duty to negotiate in good faith; content refers to both the gender neutral job comparison system and the component parts of the pay equity plan. A failure to negotiate the component parts may lead to a Union rejecting the pay equity plan completed by the employer without Union input. A failure to agree to the statutory minimum would leave both parties responsible for their failure to meet their obligation.
>
> It is preferable for the parties to negotiate their plan without resort to the Commission. Success at this depend upon the bargaining agent being a full partner in the process ... given the purpose and nature of the *Pay Equity Act*, the Tribunal will review both the process and the content of the negotiations to ensure the obligations established by the *Act* are met[34] .

105. Different statutory provisions indicate different levels of inquiry by an administrative Tribunal. For example, with respect to the bargaining requirements to reach a first collective agreement under section 40(a) of the *Labour Relations Act*, the Labour Board has said it will examine not only the process but also the reasonableness of parties positions at the bargaining table. The "unreasonableness" of even one bargaining position may be sufficient to have the Board find a violation of section 40(a) and order first contract arbitration[35].

106. Each tribunal which adjudicates on a duty to bargain in good faith must assess that obligation within the framework of the particular statute. The purpose of the *Labour Relations Act* is to foster harmonious labour relations and to regulate industrial conflict; it recognizes the imbalance of power between workers and their employers and creates a process by which the former can choose to be collectively represented by a bargaining agent. The *Labour Relations Act's* section 15 duty to bargain requires parties to negotiate in good faith to try to reach a collective agreement. The Board has said the *Act* does not require parties to reach a collective agreement, nor will it prescribe contents of that agreement or set a time frame for achieving one. Parties can bargain to an impasse, and dispute resolution can, under certain conditions, take the form of economic sanctions. Given this statutory framework, the nature of the Labour Board's inquiry is largely an inquiry into the process, to assess whether the bargaining conduct meets the requirements of that *Act*. That inquiry, to date, has only extended to the content of bargaining where collective agreement provisions are specified under the *Act* or where the content of proposals reflects a party's desire to avoid

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33 (February 16, 1990) 0016-89 (P.E.H.T) [now reported at 2 P.E.R. 1]

34 (1990), 1 P.E.R. 41 at Page 45

35 see *Formula Plastics* [1987] O.L.R.B. Rep. May 702; and *Venture Industries Canada Ltd* [1990] O.L.R.B. Rep. August 152.

making a collective agreement. The Labour Board distinguishes between "surface bargaining" which is bargaining with no intention to make a collective agreement and which is a violation of the *Act*, and "hard bargaining" where the Board has said there is no violation if a party will enter into a collective agreement but only with the contents it chooses[36].

107. The purpose of the *Pay Equity Act, 1987* differs, and in contrast to the *Labour Relations Act*, the *Act* specifies the content, the timeframes and results of the bargaining process. It is against that legislative backdrop that the bargaining obligations must be assessed. In light of those substantial statutory differences, in this case we find the Labour Board's distinction between "hard" and "surface" bargaining is not relevant or useful to our pay equity inquiry. The basis for "hard" bargaining in the Labour Board's jurisprudence is that, because the *Labour Relations Act* requires no specific results, self-interest in content can be taken to bargaining impasse and then to economic sanctions. In contrast, the legislative scheme of the *Pay Equity Act, 1987* is designed to redress systemic discrimination. Although both parties to pay equity negotiations will inevitably bargain for their self interest, that self interest does not take precedence over the statutory requirements to establish and maintain pay equity. The parties cannot rely upon process arguments to undermine the substantive goals and requirements of the legislation[37]. Where there is honest disagreement over the content requirements of the *Act*, the Tribunal provides a dispute resolution mechanism.

108. Therefore, in light of the content requirements of the bargaining obligation under the *Pay Equity Act, 1987*, the Tribunal has assessed both the process and the substance of pay equity negotiations as required by the *Act*; a failure to negotiate in good faith or endeavour to agree with respect to either of these aspects of bargaining will constitute a violation of the *Act*. This is a first look at many of these issues. In the circumstances, we find the statements of the Labour Board apt in its discussion of the then new remedial provisions under the bargaining duty of the *Labour Relations Act*. The Board said that the legal standard of the duty to bargain is broad, and substantial elaboration on a case by case basis will be required to fully articulate the duty and to achieve certainty and predictability[38]. We adopt this approach of incremental decision making. As each case comes before the Tribunal, we will be able to assess and decide the precise contours of the bargaining obligation as required by the *Act*.

109. In these early cases, it is helpful to analyse the language of the statute. Section 14 requires the parties to "negotiate in good faith" and to "endeavour to agree upon" the gender neutral comparison system and the pay equity plan before the mandatory posting date. The *Act* therefore specifies two bargaining obligations, first that the parties negotiate in "good faith" and second that they "endeavour to agree". With respect to the first part of the obligation, "good faith" requires an assessment by the Tribunal of how a reasonable person or party in good faith would approach these negotiations given the statutory directive to establish and maintain pay equity and to redress systemic gender wage discrimination. The second part of the obligation, "endeavour to agree", requires not only an assessment of their efforts to meet, discuss, and meaningfully negotiate an agreement on the gender neutral comparison system and pay equity plan, but also an investigation into whether the substance of their proposals meet the obligations of the *Act*. In approaching a section 14 complaint, the Tribunal will investigate whether in the circumstances, the parties

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36 See *Radio Shack* [1979] O.L.R.B. Rep Dec. 1220

37 P. Macklem, B. Langille "Beyond Belief: Labour Law's Duty to Bargain", Queen's Law Journal, vol. 13, No. 1, 1988 at p. 100

38 *DeVilbiss (Canada) Limited* [1976] O.L.R.B. Rep. March 49 at Par.15

negotiated in good faith and whether they endeavoured to agree; the Tribunal will also inquire whether the conduct of the party, both in substance and process, was such that it hindered pay equity bargaining.

110. In this case, we received a great deal of evidence on the negotiations which took place between the parties. We also heard very thorough and thoughtful submissions on what the scope of the bargaining duty should be. Based upon the facts in this case, we found it helpful to look at the following indicia in assessing whether there was a failure to meet the obligations in sections 14 and 7 of the *Act*. They require the parties to recognize who they must bargain with; what they must do in preparation; what they must disclose to the other party; and finally what the standards of discussion or negotiation are.

**The obligation to recognize and negotiate with the bargaining agent.**

- Did the Employer recognize and negotiate with the bargaining agent as defined by the *Act*?

**The obligation for each party to make reasonable efforts to ensure that its proposals for a comparison system meet the statutory requirements for gender neutrality.**

- In preparing the proposal, did the party make reasonable inquiries to ensure the proposed comparison system was gender neutral?
- Were the parties willing to demonstrate how the proposal was gender neutral?

**The obligation to disclose the information necessary to foster full discussion.**

- Has the party given sufficient information to enable the other party to intelligently appraise the proposal?
- Is the information sought rationally related to the issues in pay equity bargaining?

**The obligation to engage in full, open and informed discussion with respect to negotiations for the pay equity plan and the gender neutral comparison system.**

- Was there a willingness by the parties to discuss meeting the statutory requirements?
- Have parties given a justification of their positions at the negotiation table?
- Have the parties carefully considered and responded to the objections, concerns and bargaining positions of the other party?

111. In this case, the Union alleges that the Employer acted in bad faith in unilaterally hiring William M. Mercer Company Ltd. as its consultant without negotiating this with the Union. The Tribunal does not concur. The duty to bargain under section 14 does not extend to the choice by one party to retain the services of an individual or an organization to formulate bargaining proposals. Either party to pay equity negotiations may choose to hire and rely upon expert help in the course of devising their bargaining strategies. In this case, the hiring of the consultant to advise the Employer, and to formulate bargaining proposals for the Employer does not violate the *Act*.

112. Secondly, the Union alleges that the use of David Jones, a consultant with the Mercer firm as the principal spokesperson during the negotiations is also evidence of bad faith since the parties had not agreed upon him or the consulting firm. The Tribunal finds that the section 14 duty to negotiate does not extend to choice of the other party's negotiator. Parties to the pay equity process may have the spokesperson of their choice at the negotiation table. That may be a consultant, a labour relations or pay equity expert within an employer or union organization or hired on their behalf. The parties required to negotiate the gender

neutral comparison system and pay equity plan are the ones ultimately responsible for any bargaining positions taken, and it is they who must agree to, and the employer who must ultimately post the plan. The parties are responsible for any conduct or any actions taken by their agents on their behalf.

**The obligation to recognize and negotiate with the bargaining agent**

113. Section 1(1) of the *Act* specifies that "bargaining agent " in this *Act* means a trade union as defined in the *Labour Relations Act* or other applicable legislation, that has the status of exclusive bargaining agent under that *Act* in respect of the bargaining unit.

114. In assessing whether the Employer met its obligation to recognize and negotiate with the bargaining agent, we find the caselaw of the Ontario Labour Relations Board helpful. In *DeVilbiss* the Board considered whether dealing directly with employees was a violation of the duty to bargain:

> the duty described in section 14 has at least two principle functions. *The duty reinforces the obligation of an employer to recognize the bargaining agent* and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict[39]

and in *Northwest Merchants Ltd. Canada* the Board quoted from *Treco Machine & Tool Limited*:

> The certificate thus issued alters the legal relationship between the employer and the employees in the bargaining unit. The employer is no longer permitted to deal with the employees in the bargaining unit on an individual basis, but must deal with the trade union as the certified bargaining agent of all the employees in the unit.
>
> The exclusivity of the Union's bargaining rights, as conferred by a Board certificate, and the requirement upon the employer to deal with the Union, as the certified bargaining agent, and not to go behind the certificate, has received extensive judicial support.[40]

115. The *Pay Equity Act, 1987* clearly specifies that the Employer must negotiate with the bargaining agent as defined by the *Labour Relations Act* and other applicable legislation. Failure to deal directly with the bargaining agent is a violation of the *Pay Equity Act, 1987* and any attempt to bargain directly with employees or local union officials instead of the recognized bargaining agent is a violation of the obligation.

116. In this case, the Union alleges that the Employer failed to recognize the Union as exclusive bargaining agent by communicating directly with the employees in these bargaining units about pay equity. The Respondent asserts the right to communicate with its employees to inform them of its obligations under the *Act*. We concur with the Respondent in this respect. In this case, the Regional Chair communicated in writing with employees in May 1988 and Mr. McDougall held informational meetings across the municipality in May and June 1988 in order to inform employees it wished to meet its obligations under the *Act*. The Tribunal does not find that these actions violated the bargaining obligations within the statute; we find the sessions were merely informational and not an attempt to negotiate directly with employees. Although any effort to directly negotiate with employees would undermine the authority of the Union as exclusive bargaining agent and constitute a violation of the bargaining obligation under the *Act*, we find no such evidence of this in this instance.

117. The Union also alleges that the Employer failed to recognize the bargaining agent when it continually tried to negotiate with the local president instead of the provincial bargaining agent, despite the

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39 *supra*, at paragraph 15
40 [1983] O.L.R.B. Rep. July 1138

Union repeatedly informing the Employer it was required to bargain with the provincial bargaining authority. In this case, there was no dispute that, unlike some unionized situations where there is considerable autonomy of local unions, that the Ontario Nurses Association has a highly centralized structure. As the evidence confirmed, the provincial organization is certified for these bargaining units, negotiates and is signator to the collective agreements. The evidence was undisputed that the bargaining history between these parties has always been with the provincial authority and not the local.

118. In this case, Mr. McDougall initially communicated with the local president Ms. Jayne Holmes in December 1987. The Respondent states that from the outset the provincial bargaining agent was copied, and for the first two months after the statute was enacted, ONA made no effort to inform the Employer that it had improperly communicated with the local president. We agree, the Tribunal finds the conduct of the Employer in these early memorandums does not constitute a violation.

119. However, after March 1988 there were several communications between Ms. Brown, Ms. Andrews, and the Employer, confirming that the Employer was obliged to negotiate pay equity with the provincial bargaining agent and not local union officers who the Employer concedes have never had collective bargaining authority. In May 1988, Ms. Andrews expressly informed the Employer that they had an obligation to negotiate with the provincial bargaining agent. In that correspondence she pointed out to the Municipality that both the pay equity plan and the gender neutral comparison system must be negotiated with the Union, and that they were requesting negotiations commence for these two bargaining units. She expressed concern about the Employer's decision to use the Mercer system, about the lack of information and the lack of negotiation with the Union as well as concern with the Municipality unilaterally implementing its action plan on the questionnaire and the job evaluation process. The letter asked that ONA as the bargaining agent be able to fully participate at all steps of the process and requested a meeting to establish the terms of reference for pay equity negotiations. McDougall wrote back agreeing to a meeting on June 9, 1988. At this point we find that the Employer was clearly on notice that the bargaining agent was asserting its right to negotiate pay equity and that the local presidents did not have authority to negotiate for the Union.

120. However, the Employer in July 1988 again contacted the local president of Local 153 to set up central negotiations on the questionnaire; it also sent her a draft letter of understanding to sign with respect to the utilization of the job analysis questionnaire, in both cases only photo-copying ONA. One week later, the Employer further communicated with the two local presidents informing them of meetings to discuss the questionnaire, again without the approval of the bargaining agent. When the local president did not attend the meeting, McDougall wrote again to inform her what decisions had been taken and when the next central meeting was. Mr. McDougall's evidence was that despite the fact that the bargaining agent had been clear about its authority to negotiate pay equity, he still believed the local people had a role to play in negotiations and that photocopying of the bargaining agent to keep it informed was, in his view, sufficient to discharge the Employer's obligation to recognize the bargaining agent. We do not agree.

121. Again, we find the Labour Board helpful. In *Oakridge Villa Nursing Home*[41] the Board found that local union officials signing a collective agreement without the authority of the provincial bargaining agent constituted a violation of the bargaining duty, and the Board declared the collective agreement null and void. The Board recognized that the employer could not by-pass the bargaining agent by negotiating with local officials who had neither ostensible or actual authority. In this case, in continuing to by-pass the bargaining agent after ONA had raised the issue, the Employer undermined its authority to negotiate pay

41 [1987] O.L.R.B. Rep. July 1026 at par. 14 and 15:

equity and violated the obligation to negotiate with the bargaining agent as required by the *Act*. The labour relations caselaw points out how vital this obligation is. Employees choose who their exclusive bargaining agent is at the point at which they elect to be represented by a Union. That bargaining agent is certified under the *Labour Relations Act* and recognized by the *Pay Equity Act, 1987*. To photocopy the bargaining agent is no defense to the failure to recognize and negotiate with the bargaining agent, and accordingly, the Tribunal finds a violation of section 14 of the *Pay Equity Act, 1987*.

122. Similarly, we find the Employer's final decision to use one comparison system for all its bargaining units is a failure to recognise ONA as the bargaining agent. The fact that the Regional Municipality wanted a centralised bargaining structure and one system for its establishment was a reasonable bargaining position. The statute provides a mechanism to allow parties to negotiate centrally if they agree to; however, there is no obligation to do so and in fact the *Act* requires the Employer to bargain a comparison system and pay equity plan with each bargaining agent. In this case, ONA rejected central negotiations with the other unions, and the Employer had no statutory authority to force the Union to agree to one central system. Although the Employer could continue to propose its system at the bargaining table, it could not refuse to negotiate any system that differed from the other locals in the establishment. As the Labour Board held in *Rolph-Clark-Stone Packaging*[42], the refusal to negotiate with one local except upon terms being negotiated with another local, is refusal to recognize the bargaining agent and constitutes a violation of the obligation to negotiate in good faith. In this case, the Employer ended negotiations unilaterally when it could not force its central system upon the Union. In our view, this was tantamount to a refusal to recognise the bargaining agent and is a violation of the obligation to negotiate in good faith.

**The obligation for each party to make reasonable efforts to ensure that its proposals for a comparison system meet the statutory requirements for gender neutrality.**

123. The Tribunal recognizes that it is not possible for a party to absolutely ensure the gender neutrality of its proposed comparison system, particularly in meeting obligations under a new statute with little caselaw as guidance to the legal standards. However, this does not allow a party to opt out of its statutory obligation to negotiate in good faith and endeavour to agree upon a gender neutral comparison system. At the point at which ONA raised concerns about the gender neutrality of the system proposed, the Employer had an obligation to make inquiries and to make reasonable efforts to assess whether the concerns were either founded or unfounded. In this case, the Employer did not do this. Mr. McDougall's evidence was that he merely passed the written ONA critique about the gender bias of the methodology to the Mercer consultant. He did not ask questions, did not request a report or analysis or undertake one himself, nor did he receive a report either orally or written. The Employer took no steps to investigate the complaints other than take the assurances of the consultant that the complaints were only "syntax and semantics" by the Union. The Employer's evidence was that it did not put its mind to how the comparison system would address possible systemic discrimination in its establishment, which the *Act* requires Employers to identify and redress. When the Employer tabled the proposals, it made no effort to demonstrate to the Union that the comparison system was gender neutral, or how the system would identify and value the work performed by female and male job classes to determine whether pay equity exists. Despite the Union's requests, it did not demonstrate how the comparison system would comply with the *Act*'s requirement to identify gender discrimination in compensation. Much of the information introduced at the hearing, on the details of the comparison system and whether it was gender neutral, was not developed in writing or made available during negotiations.

42 [1980] O.L.R.B. Rep. Jan 93

124. Therefore, the Tribunal finds that although the proposal to use its comparison system may have been a reasonable first bargaining position for the Employer, it is not a defence to complete inflexibility. Clearly, it is reasonable to hire a consulting firm with established credentials in the job evaluation field, and to accept the expert advice that a system is gender neutral. We find however, that once its system's gender neutrality is called into question, the Employer must make reasonable efforts to try to ensure that the comparison system meets the statutory requirements of the *Act*. It must inquire whether it can accurately collect the skill, effort, responsibility and working conditions of all the job classes to be compared; it must assess whether it makes visible work, particularly women's work in the establishment; and whether the choice of any sub-factors, equivalencies or weighting unfairly disadvantage or advantage the valuing of the female or male job classes. If the advice of the consultant is wrong, it is the Employer who has failed to meet its obligations and it is the Employer, not the agent against whom the Tribunal may order a remedy. We find in this case, that the Employer did not make reasonable efforts to ensure that the comparison system was gender neutral. It did not make reasonable inquiries to ensure that the system accurately collected and valued the work of all job classes or to ensure that the initial weighting embedded in the equivalencies was gender neutral. Further, it was not willing to demonstrate to ONA how the proposal was gender neutral.

**The obligation to disclose the information necessary to foster full discussion**

125. The Union alleges that the Respondent failed to disclose information with respect to the gender neutrality of the proposed comparison system including the results of the pilot test. The disclosure requirement has been dealt with by this Tribunal. The Tribunal has held that the parties require sufficient information to be able to conduct bargaining in a rational and informed manner. The obligation to disclose includes an obligation to give sufficient information to allow parties to test the gender neutrality of their own proposals and to assess the bargaining position of the other party. The Tribunal in *Cybermedix* wrote:

> For the parties to negotiate in good faith and endeavour to agree on the job comparison system and the pay equity plan, there must be disclosure of relevant pay equity information. Disclosure is required to foster rational and informed discussion and to move towards settlement. The parties must have sufficient information to intelligently appraise the other's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members.[43]

126. The Tribunal finds that from the outset the Municipality shared information; specifically, it forwarded copies of the available job descriptions, salary and benefits information and a copy of the CUPE 2210 rating manual. The Employer also disclosed requested information on how the Mercer sub-factors fit into the four criterion of skill, effort, responsibility and working conditions.

127. The Union also alleges that the Employer refused to disclose a terms of reference for the pay equity process. The Employer does not dispute that it promised on a number of occasions to draft a terms of reference and that it never did so. We agree with the Respondent that this does not constitute a violation of the disclosure obligation. Although it may have been helpful if these parties had negotiated a terms of reference by which they could conduct themselves through this process, especially given their agreement in this case to have one, it did not happen. We also note that the Union finally drafted and sent the Employer a draft Terms of Reference on October 25, 1988 after a number of months waiting for the Employer's draft, and this draft has not yet been negotiated.

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43 See also *Riverdale Hospital, supra* at paragraph 20

128. The Tribunal finds the Respondent failed to meet the disclosure obligation under section 14 in two respects. First, the Employer refused to disclose the results of the pilot test it conducted to test the system. The Union requested this information on the basis that it was vital to the Union's assessment of whether the system could produce reliable and valid data for the nurses' work. The refusal to disclose these pilot results is a violation of section 14. We note that these results may have assisted the Union in appraising the Employer's proposals and in formulating its own bargaining positions. Secondly, as the evidence of Mr. Cann and Mr. McDougall disclosed, they were aware when they hired Mercer that the system was a scored questionnaire and that the questionnaire was to be fed into a computer to tabulate and average incumbent and supervisor responses. Mr. Cann testified that the Regional Municipality understood that because of this computer program, there was little flexibility to change the system. The Regional Municipality did not disclose the information it was given on the computer program or weighting embedded in the questionnaire when asked by the Union for more details on the system. We find therefore, that the Employer did not give ONA sufficient information to enable the Union to intelligently appraise the system. This information was available and was rationally related to issues in pay equity bargaining. We find therefore, that the Employer violated section 14 of the *Act* in this respect.

**The obligation to engage in a full, open and informed discussion**

129. The Union alleges that the Employer never seriously engaged in negotiations for pay equity. It alleges that the Employer began to unilaterally implement the first stages of the pay equity plan and comparison system without full discussion or any negotiation; and alleges that when the Employer came to the negotiating table, it never seriously bargained.

130. In assessing the bargaining duty, we draw again on labour relations jurisprudence; in *Canadian Industries Limited*, the Labour Board held that the unwillingness of one party to engage in full discussion with the other was a violation of the obligation to bargain in good faith:

> 8. The conduct of negotiations is not only judged in terms of mutual recognition but also in terms of quality of discussion. This latter factor is somewhat broader in its application, extending to those situations where *there may be present the common objective of entering into collective agreement, but where there is absent any willingness to discuss how that common objective might be reached.*
>
> 22. The discussions that took place between the parties must be examined in order to determine whether there was something less then the full and free discussion required by the statute. A careful scrutiny of the negotiations reveals an unwillingness on the part of the respondent to *either provide a full justification for its own position on monetary terms* or to *discuss its objections* to the applicant's position in these matters.[44] (emphasis added)

131. Thus the Tribunal finds that it is not enough that parties have the common objective of posting a pay equity plan, they must also meet the obligation to have a full and informed discussion of all pay equity issues. The Tribunal will scrutinize the pay equity negotiation process to ensure that parties have undertaken a full and informed discussion of the aspects of the pay equity plan and gender neutral comparison system they are required to negotiate. This means giving justification for their positions at the negotiating table. It also requires each party to carefully consider and respond to the objections, concerns and bargaining positions of the other party.

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44 [1976] O.L.R.B. Rep. May 199

132. The Tribunal finds that the initial development of an action plan and time schedule by any party as a proposal to bring to the bargaining table is not subject to the bargaining obligation. However in this case, having weighed the evidence, we find that the Employer began implementing the initial stages of its plan prior to negotiation with the Union. It failed to engage in an open and full discussion and any involvement of the Union was scheduled well into the process. Although it is commendable that the Employer promised to keep the Union informed of the details of the pay equity process, the obligation with respect to the *Act* is a much higher obligation. It is the obligation to negotiate and endeavour to agree upon a pay equity plan and a gender neutral comparison system. The Respondent did not appear to grasp that it was required to negotiate all the component parts with the bargaining agent.. We find then, that the Employer was unwilling to discuss how the parties would together meet the statutory requirements of the *Act*.

133. We also find that the Employer failed in the obligation to have a full and informed discussion by failing to communicate key information to the Union with respect to the comparison system. For example, Exhibit 61 was an outline of the Mercer comparison system as proposed for implementation in this establishment. Despite repeated requests by the Union for additional information on the system, the Municipality did not prepare any manual or programme to describe the system until it did so for purposes of the hearing, almost one year after negotiations ended.

134. In this case, the Regional Council approved the action plan in April 1988 prior to any negotiation with the Union. Although Mr. McDougall's evidence was that it was not impossible to go back to Regional Council to change the system, we find that the prior approval at Council to buy the Mercer system before the Employer came to the bargaining table, heightened the Respondent's commitment to that comparison system and reduced the likelihood that negotiations with the Union would change its mind. The effect on the bargaining was problematic. For example, the Employer continued to insist it was using this point factor job evaluation system without adequately justifying these decisions to the bargaining agent. Nor did the Employer carefully consider or respond to ONA's concerns about gender bias even though they had received a detailed written critique from the Union.

135. In *Canadian Industries*, in discussing the relationship of statutory requirements of the *Anti-Inflation Act* and collective bargaining, the Labour Board wrote:

> *By adopting its own interpretation of the anti-inflation regulations and indicating its unwillingness to discuss any other interpretations, it has foreclosed the kind of full discussion required by the law.* A party cannot wrap itself in a cloak fashioned from its own interpretation of the guidelines in order to avoid the obligation to bargain in good faith.[45] (emphasis added)

136. We find this reasoning useful. Each party to the pay equity negotiation process is entitled to bring to the bargaining table its interpretation of the requirements of the *Act*. There must be space in pay equity negotiations for honest disagreement. We appreciate that the Employer took the consultant's advice in adopting its interpretation of the *Act*. However, in adopting that interpretation a party cannot be unwilling to discuss other interpretations of pay equity requirements. Such an unwillingness is particularly crucial in the pay equity context. Not only does the *Act* set the framework for the negotiation process, it sets the content, the time frames and the results which are to be achieved. It requires that parties consciously examine past wage setting practices and design an affirmative action plan to redress wage discrimination in that establishment. Therefore, in adopting its own interpretation of the *Act*, one party cannot foreclose a full and

45 *supra* at paragraph 24

open discussion of the issues to be negotiated, whether it is endeavouring to agree upon the gender neutral comparison system or the pay equity plan. Such an unwillingness defeats the purpose of parties bargaining pay equity and constitutes a violation of the obligation to negotiate in good faith.

137. The Tribunal finds that the Municipality adopted its own interpretation of the *Act* and was unwilling to consider any other interpretation. Although parties are entitled to maintain a position in bargaining, they must be open to a discussion on other interpretations and must reasonably justify maintaining their bargaining positions. In this case, the Employer failed to consider ONA's concerns about the gender bias of the questionnaire. The Employer's evidence confirms it rejected without consideration the possibility of any other comparison system, and that it also rejected without any serious consideration any amendments to its own system beyond marginal changes to the questionnaire. ONA's written critique revealed problems in the ability of the questionnaire to accurately collect the job requirements of the nurses, as well as raising specific issues and concerns about where gender bias appeared in the comparison system. The bargaining unit nurses through ONA also documented in writing the difficulties they found with the questionnaire. Yet the Employer failed to consider these critiques seriously. The Employer refused to make any alterations to many sub-factors such as planning skills, internal contacts and supervision of others, and did not give justification for its inflexible position. We find that the Employer was unwilling to discuss the concerns of the Union or respond in any meaningful way. This inflexibility served to prohibit full and open discussion on how to meet the statutory requirement for a gender neutral comparison system.

138. During the negotiations, ONA suggested that the Employer abandon the Mercer designed comparison system and suggested the parties should instead design one themselves or alternatively, jointly hire the firm of Hubbard Revo-Cohen to undertake this. Ms. Andrews followed up in writing on October 25, 1988 proposing these alternatives, but providing no details. The Employer responded on November 7, 1988, writing that it would not change its system further and that it did not require the services of Hubbard Revo-Cohen. The Employer admitted that it did not consider the alternatives before rejecting them outright. It did not seek any information, ask any questions or request the Union to provide any information, nor was this supplied by ONA. The Hubbard Revo-Cohen methodology was not before the Tribunal and we received no evidence with respect to it.

139. The Union also alleges that the pilot test, conducted on April 27, 1988 without the agreement of the bargaining agent, is a further violation of the duty to bargain in good faith. The Municipality submitted it needed the test to ensure the sub-factors adequately reflected the jobs in the establishment. We find that the Employer did not violate the obligation to negotiate in good faith by conducting a pilot test. Any party is entitled to test its proposals in attempting to meet its statutory obligations. An Employer must make reasonable efforts to ensure that any comparison system it is proposing is gender neutral. However, the Tribunal finds that a bargaining agent is also entitled to test for the gender neutrality of its proposals or conduct tests that assess whether the Employer's system is gender neutral, and to this end the Union is entitled to the Employer's full co-operation. Practically speaking, it is preferable that parties jointly conduct testing, but we do not find that the conducting of a pilot test by one party constitutes a violation of the bargaining duty. In this case, the Employer pilot tested a preliminary version of the questionnaire, the consultant reviewed the responses, but kept no records. We find that this is unfortunate because analysis of the pilot responses by the Employer may well have convinced it that the system had problems and may have encouraged it to engage in a more full and open discussion.

140. Finally, we deal with the Employer's position that changes requested by ONA were too costly and that it had to act unilaterally and keep the time frame moving because of its obligations under the *Act*. Both Mr. Cann and Mr. McDougall's evidence was that delay on revising the questionnaire to meet the Union's concerns interfered with the Employer's efforts to meet the time frames. It is true that both parties had an obligation to meet and negotiate in good faith in an effort to meet the mandatory time frame. Those time frames imply to a certain extent that parties work efficiently. However, the time frames do not serve as a defence to unilateral decision making or action by one party. The *Act* specifically includes a dispute resolution mechanism when parties reach a block or impassse.

141. Similarly, parties cannot opt out of their statutory obligations to negotiate and to endeavour to agree upon a gender neutral comparison system because of cost and efficiency considerations. It is hoped that parties achieve pay equity by directing dollars toward the amelioration of women's wages as opposed to administrative costs. However, parties cannot have administrative costs override where they conflict with the statutory requirement of negotiating a gender neutral comparison system and pay equity plan[46]. In pay equity, we find that any consideration of cost savings which has the effect of parties bypassing their statutory obligations is not acceptable. Again, where there are legitimate differences with respect to decisions on gender neutrality, the parties have recourse to the dispute resolution mechanism set out in the *Act*.

## *Remedies*

142. A wide range of remedies are available to the Tribunal. In deciding what relief is appropriate to the facts of this case, we recognize that remedies are not to be punitive, rather they should be aimed at rectifying the consequences of a violation of the *Act*. The Tribunal has a broad discretion to craft remedies which will assist the parties in meeting their obligations under the *Act*. In doing so, we must ensure that they will be effective and applicable to the particular circumstances of this case. We find the comments of the Labour Board in *Radio Shack* helpful in this respect:

> It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies[47].

143. In addition to being fair and equitable, we find that remedies should be crafted in such a way as to allow parties to fulfill their obligations under the *Act* as expeditiously as possible. We note in this case, the mandatory posting date was January 1, 1990, and thus these parties are already behind in the time frame in which any payouts would have been made. To send the parties back to the negotiating table without any direction or timeframes would thus not, in our opinion, serve to facilitate speedy completion and posting of a pay equity plan.

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46 In *Singh et al v. Minister of Employment and Immigration* [1985]1 S.C.R. 177, the Supreme Court of Canada held that administrative cost savings cannot ignore the principles of fundamental justice. Although not on point, it is helpful in the Tribunal's assessment of balancing costs with statutory obligations.

47 [1979] O.L.R.B. Rep. Dec. 1220 at par. 93

144. The Union submits that the Mercer comparison system as proposed by the Employer for this workplace is irreparable in its gender bias and thus it should not be required to negotiate it as the basis of a gender neutral comparison system. It relies on its expert evidence as confirmation of this position.

145. In weighing the possible remedies, we do not find that it is appropriate to require the Union necessarily to bargain to amend the Employer's proposed comparison system. We have found that the Employer began to unilaterally implement the first steps of this system without recognizing the obligation to bargain the comparison system with the Union. Given this bargaining history, to order the parties to negotiate only on the basis of the Mercer system would be to encourage parties in the future to unilaterally adopt a comparison system, confident that the Tribunal would accept that system despite the bargaining conduct, and order only amendments. To grant a "license" to by-pass the bargaining obligations set out in the *Act* is not an appropriate message to send to these parties, and would in our opinion, detract from the effectiveness of the remedy and the obligations under the *Act*.

146. However, we also recognize that the Employer has invested considerable resources in its comparison system. We are not persuaded that the comparison system is so lacking in gender neutrality that it is irreparable. It may well be that the system could be effectively amended, now that the parties have some guidance as to both the standards of gender neutrality and direction with respect to their bargaining obligations.

147. The Tribunal's remedial powers under section 25 (2)(g) includes the power to order parties to take such action as in our opinion is required in the circumstances. In these circumstances we find that parties, while being given some flexibility in the choice of comparison system, must meet particular requirements and deadlines in order that there will be an expeditious completion of the pay equity plan. The fact that we have crafted a remedy under the general remedial provision does not detract from its authority. We are assisted in coming to this conclusion by the comments of the (then) Ontario High Court of Justice (Divisional Court) in its discussion of damages in *Tandy Electronics*:

> So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the *Act* itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award damages is novel, that the remedy is innovative, should not be a reason for finding unreasonable[48].

148. In this case, we find the remedy to be ordered flows directly from the scope and the provisions of the *Act*. In making this order we encourage the parties to negotiate a terms of reference or strategy for bargaining of the gender neutral comparison system and pay equity plan. We are concerned that negotiations continue expeditiously and as such, we strongly recommend that the parties seek the mediation services provided by the Pay Equity Office Review Services Branch.

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48 *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America and the Ontario Labour Relation Board* (1980) 80 C.L.L.C. par. 14,017 at page 93.

## *Order of the Tribunal*

1) We find that the Employer, the Regional Municipality of Haldimand–Norfolk has violated the *Act* and in particular sections 5, 7, 12 and 14. We find that the Employer failed to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and a pay equity plan. In particular, we find that the Employer failed to negotiate the component parts of the gender neutral comparison system; failed to recognize the bargaining agent; failed to disclose information on the pilot tests, computer program, and weights embedded in the questionnaire; and failed to engage in a full and informed discussion. We also find that the comparison system proposed by the Employer does not meet the standards of gender neutrality required by the *Act* and specifically that it does not accurately capture and thus not value the content of the skill, effort, responsibility and working conditions of the work required to be done by the female job classes in these bargaining units.

2) We order the Employer to negotiate in good faith and endeavour to agree with the Union upon a gender neutral comparison system and a pay equity plan for these bargaining units.

3) We hereby revoke the order of the Review Officer dated April 6, 1989.

4) We order that within 60 days of receipt of this decision, that the Union table and negotiate with the Employer a proposed comparison system of its choosing, including justification of its applicability to this workplace and an explanation of what reasonable efforts it has made to ensure the system is gender neutral, based upon the statutory criteria and considerations articulated in this decision.

5) Further, we order that within the same 60 day period, that the Employer table and negotiate with the Union a proposed comparison system of its choosing, including justification of its applicability to this workplace and an explanation of what reasonable efforts it has made to ensure the system is gender neutral, based upon the statutory criteria and considerations set out in this decision. If the Employer chooses to amend the Mercer comparison system it proposed in this case, we order that it amend the proposed system to address the deficiencies found by the Tribunal in this decision and that it negotiate all the component parts of the comparison system with the Union.

6) We order the Employer and the Union to fully co–operate with each other to pre–test the proposed comparison systems.

7) We further order that each party disclose to the other, the details of the comparison systems proposed, including: any results of testing the system; information and results regarding other applications of the comparison systems if the party is relying on them; details of any proposed sub–factors, levels, equivalencies and weighting; as well as any computer programs which form part of the comparison system.

8) This panel will remain seized to deal with any matters arising directly out of this order.

**0141-90** Glengarry Memorial Hospital, Applicant v. Ontario Nurses' Association, Respondent

**Before:** Janis Sarra, Vice-Chair, and Members Bruce Budd and Donald Dudar

**Appearances:** Anne Burke, Susan Baxter for the Applicant, Glengarry Memorial Hospital; Anne Marie Delorey, Pauline Lefebvre Hinton, Raymonde Boileau, Dan Renaud for the Respondent, Ontario Nurses' Association

**Cite As:** Glengarry Memorial Hospital (1991), 2 P.E.R. 153

### Pay Equity Act - Adjustments - Collective Agreements

The Applicant began paying a female job class in the bargaining unit represented by the Respondent a pay equity adjustment of $.37 per hour more than the rate specified in the collective agreement to equal the job rate of a comparably valued non-union male job class. When a new job rate became effective under the collective agreement for the female job class, the Respondent also paid the male job class at the same rate. The issue before the Tribunal was the relationship, if any, between the new job rate in the collective agreement and the pay equity adjustment.

The Tribunal held that the new job rate in the collective agreement must be increased by $.37 per hour.

Section 13(10) of the *Act* requires that pay equity adjustments be incorporated into the collective agreement rate that prevails as of the date of adjustment, and then requires that whatever increases in rate may be provided for thereafter in the collective agreement be calculated on the basis of the adjusted rate.

### Pay Equity Act - Maintaining Pay Equity

The Applicant began paying a female job class in the bargaining unit represented by the Respondent a pay equity adjustment of $.37 per hour more than the rate specified in the collective agreement to equal the job rate of a comparably valued non-union male job class. When a new job rate became effective under the collective agreement for the female job class, the Respondent also paid the male job class at the same rate. The increase to the male job class was considerably smaller than the increases given to the Applicant's other non-union staff. The Respondent argued that the Applicant violated the *Act* by failing to maintain pay equity.

The Tribunal held that the employer violated s. 7 of the *Act*.

An employer can set salaries for staff with whom it does not have to collectively bargain. In this case, all the non-union staff received increases of 5.5% or more except the male job class and two other male job classes of equal value. This differential treatment had the impact of artificially holding back the nurses' job rate.

### Loi sur l'équité salariale - Rajustements - Conventions collectives

L'auteur de la requête a commencé à verser aux membres d'une catégorie d'emplois à prédominance féminine comprise dans l'unité de négociation représentée par l'intimé un rajustement au titre de l'équité salariale de 0,37 $ l'heure. Ce rajustement était supérieur au taux précisé dans la convention collective pour que la rétribution de ces membres soit égale au taux de catégorie accordé à une catégorie d'emplois à prédominance masculine non syndiquée et utilisée à des fins de comparaison. Quand un nouveau taux de catégorie est entré en vigueur en vertu de la convention collective en ce qui concerne la catégorie d'emplois à prédominance féminine, l'intimé a versé le même taux aux membres de la catégorie d'emplois à prédominance masculine. La question dont était saisi le Tribunal était la suivante : quel rapport, le cas échéant, existe-t-il entre le nouveau taux de catégorie de la convention collective et le rajustement prévu en matière d'équité salariale.

Le Tribunal a statué que le nouveau taux de catégorie précisé dans la convention collective doit être majoré de 0,37 $ l'heure.

Le paragraphe 13(10) de la *Loi* exige que les rajustements effectués au titre de l'équité salariale soient incorporés au taux de la convention collective qui est en vigueur à la date du rajustement. Il exige aussi que toute augmentation de taux prévue par la suite dans la convention collective soit calculée en fonction du taux rajusté.

### Loi sur l'équité salariale - Maintien de l'équité salariale

L'auteur de la requête a commencé à verser aux membres d'une catégorie d'emplois à prédominance féminine comprise dans l'unité de négociation représentée par l'intimé un rajustement au titre de l'équité salariale de 0,37 $ l'heure. Ce rajustement était supérieur au taux précisé dans la convention collective pour que la rétribution de ces membres soit égale au taux de catégorie accordé à une catégorie d'emplois à prédominance masculine non syndiquée et utilisée à des fins de comparaison. Quand un nouveau taux de catégorie est entré en vigueur en vertu de la convention collective en ce qui concerne la catégorie d'emplois à prédominance féminine, l'intimé a versé le même taux aux membres de la catégorie d'emplois à prédominance masculine. L'augmentation versée à la catégorie d'emplois à prédominance masculine était considérablement inférieure aux majorations que l'auteur de la requête avait consenties aux autres catégories de personnel non syndiqué. L'intimé a soutenu que l'auteur de la requête avait enfreint la *Loi* car il n'avait pas maintenu des pratiques de rétribution assurant l'équité salariale.

Le Tribunal a statué que l'employeur avait enfreint l'article 7 de la *Loi*.

L'employeur peut fixer les salaires du personnel qui n'est pas représenté lors des négociations collectives. Dans le cas présent, tout le personnel non syndiqué a reçu une augmentation d'au moins 5,5 %, sauf la catégorie d'emplois à prédominance masculine en question et deux autres catégories d'emplois à prédominance masculine de valeur égale. Cette différence de traitement a eu pour résultat de retenir artificiellement le taux de catégorie des infirmiers et infirmières.

**DECISION OF THE TRIBUNAL, JUNE 6, 1991**

1. This is an application by the Employer, Glengarry Memorial Hospital ("the Hospital"), seeking to revoke an order of a Review Officer dated September 28, 1990, which orders the Employer to pay the female job class in these Ontario Nurses Association ("ONA") bargaining units an additional $0.37 per hour. From this order, there are three issues before us. First, the Employer disputes the Review Officer's finding that it violated section 13(10) of the *Pay Equity Act, 1987*, S.O.1987, c.34, as amended, (the "*Act*") by failing to incorporate the pay equity adjustments into the collective agreement. Second, the Employer denies that it failed to maintain pay equity as required by section 7(1) of the *Act*. Finally, the Employer denies that it breached section 9(1) of the *Act* by reducing the male comparator's wage to achieve pay equity.

*The Facts*

2. The facts are not in dispute. During the negotiations for a pay equity plan, the parties agreed that the registered nurses employed by the Hospital constitute one female job class for pay equity purposes. No male job class of equal or comparable value ("male comparator") existed in the ONA bargaining unit. When the parties were unable to reach agreement on a pay equity plan, they sought the assistance of a Review Officer. By an initial order dated November 24, 1989, the Review Officer found that the maintenance supervisor is the male comparator for the female job class of registered nurse.

3. ONA filed an application for hearing to the Tribunal objecting to the first Order. Before the matter was heard, the parties agreed in a memorandum of settlement to:

> execute a pay equity plan and implement adjustments for registered nurses retroactive to January 1, 1990, consistent with the results of the comparison made by the Review Officer in her order dated November 24, 1989.

On January 1, 1990, the hourly job rate for the male comparator was $19.90 and the hourly rate for nurses was $19.53. Thus there was a wage gap of $0.37 per hour. The Hospital agreed to amend the collective agreement by the full pay equity amount effective January 1, 1990 and as a consequence, the nurses received a pay equity increase of $0.37 per hour. The parties did not discuss the import of section 13(10) when they settled the pay equity plan. The Employer also settled other pay equity plans for its establishment and paid out in total at least one percent of its 1989 payroll in 1990 pay equity adjustments.

4. The existing collective agreement between ONA and the Employer provided that the hourly job rate of the Registered Nurses would increase from $19.53 to $20.62 on April 1, 1990, an increase of $1.09 per hour. From April, 1990 onwards, the Employer paid the nurses $20.62. As a result, ONA complained to the Review Officer that they were entitled to the rates previously negotiated in the collective agreement as well as the $0.37 pay equity adjustment. The Officer agreed with ONA and issued a second order dated September 28, 1990. This order, which is now at issue before us, required:

> the Employer to adjust forthwith the rates of pay for the incumbents of the full time and the part time Registered Nurse job classes by $0.37 retroactive to April 1, 1990. Each step of the full time and the part time pay grids shall therefore be $0.37 more than the increments set out in the April 1, 1990, salary ranges of the collective agreements.

5. The Review Officer also dealt with ONA's allegation that the Employer failed to maintain pay equity contrary to its obligation under section 7(1) of the *Act*. The beginning of April 1990 was the date for the

annual review for non-union staff, and on April 1, 1990 the Employer increased their wage rates. The Hospital's evidence was that it gives annual increases based upon its normal practice of estimating the increase that members of the Canadian Union of Public Employees in their Hospital would receive at interest arbitration; the Hospital's estimate for the period in question was 5.5%. That figure was also the general funding increase given to the Hospital for the year. The only three jobs which were not given at least the 5.5% increase were the maintenance supervisor and two other jobs pegged at the same value for the purposes of pay equity. These jobs each received a 3.6% increase; whereas, the remaining of the 17 non-union job classes received increases from 5.5% to 29%. The Employer explained the increases above 5.5% for 7 job classes as "non-pay equity" increases which were internal equity adjustments. Its only explanation for giving the male comparator less than the 5.5% increase given to all other non-union job classes was that a 3.6% increase would keep the male comparator at the registered nurse rate of $20.62 per hour. The Hospital submits that it does not rely upon the red-circling provision of section 8(1) of the *Act* as justification for the smaller increase to the male comparator job class.

6. In the present application before the Tribunal, the Employer objects to the Review Officer's order. The Employer states that it was required to adjust the wages of the nurses in order to redress the wage gap that existed between the collective agreement rate for the nurses and the hourly rate for the male comparator from January 1, 1990 to April 1, 1990. It submits that because the wage gap no longer existed as of April 1, 1990, it is no longer obliged to pay the $0.37 or any other amount in respect of pay equity. The Employer submits that maintaining pay equity merely requires that the male comparator's hourly rate does not exceed that of the nurses.

7. ONA submits that they are entitled to the full measure of the increase provided for in their collective agreement as well as the full measure of the previously determined pay equity adjustment. ONA relies on the Officer's findings that sections 13(10) and 7(1) of the *Act* require that the previously determined pay equity wage adjustment is folded into the collective agreement, with the effect that all nurses' rates set out in that collective agreement were increased by $0.37. ONA further submits that the Employer breached section 9(1) of the *Act* by reducing the male comparator's wage to achieve pay equity.

*Section 13(10) Requirements*

8. With respect to the Review Officer's finding that the Employer must uniformly apply the pay increases to all increment stages and salary ranges of the collective agreement, we agree. Section 13 contains the requirement to prepare pay equity plans, and sets out what, at a minimum, they must include. Section 13(10) specifies that the plan prevails over all the relevant collective agreements:

> 13(10) A pay equity plan that is approved under this Part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements.

Therefore, section 13(10) requires the adjustments to rates of compensation required by the pay equity plan shall be incorporated into, and form part of the relevant collective agreements. This requirement is unusual in that it prevails over and adjusts rates which have been collectively bargained and which govern the parties for the life of the collective agreement. The collective agreement continues to operate as before but with the pay equity adjustments included in the rates of compensation. Section 13(10) thus enables the Tribunal to

examine the collective agreement and the payment of wage rates under it, in order to exercise its jurisdiction to determine whether a party has complied with section 13(10)[1]. Section 13(10) requires that pay equity adjustments be incorporated into the collective agreement rate that prevails as of the date of adjustment ("the Adjusted Rate"), and then requires that whatever increases in rate may be provided for in the collective agreement thereafter be calculated on the basis of the Adjusted Rate. Those increases may be expressed as an absolute dollar amount, as they were here, or may be expressed as a percentage, depending upon how the increases were originally negotiated in the collective agreement.

9. This approach respects the integrity of both the pay equity process and the collective agreement negotiations, and recognizes that a portion of the nurses' hourly rate is attributable to each. To adopt the Employer's approach would permit either the pay equity adjustment to be swallowed up by the collective agreement or a portion of the collectively negotiated increase to be swallowed up by the pay equity adjustment. The Tribunal's approach is least intrusive with respect to the collectively bargained employment contract.

10. In this case, at January 1, 1990, the wage gap between the nurses and the male comparator was $0.37 per hour. The Employer had agreed to implement the full amount of this adjustment on January 1, 1990. The pay equity adjustment is deemed to be incorporated into and form part of the collective agreement pursuant to section 13(10) of the *Act*. Based upon their agreement, the effect of section 13(10) of the *Act* would be to change the collective agreement rate on January 1, 1990 from $19.53 to $19.90 ("the Adjusted Rate"). The collective agreement provided for an April 1, 1990 rate which is an increase of $1.09 per hour. This negotiated increase would be added to the Adjusted Rate of $19.90. The collective agreement rate on April 1, 1990 would thus become, pursuant to section 13(10), $20.99.

*Maintaining Pay Equity*

11. The second issue arising out of the Order of September 28, 1990, is whether the Employer failed to maintain pay equity as required by section 7(1) of the *Act*. The Employer denies that it violated section 7(1). ONA submits that it is entitled to an amount greater than $0.37 per hour because the Employer failed to maintain pay equity. Section 7(1) specifies:

> Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.

The *Act* is aimed at eliminating systemic wage discrimination by identifying and redressing the wage gap between female and male job classes which perform work of equal value. Once pay equity has been achieved, the statute requires parties to maintain pay equity. Section 7(1) of the *Act* requires that the Employer maintain compensation practices that provide for pay equity, and section 7(2) prohibits employers and bargaining agents from bargaining or agreeing to compensation practices which do not establish or maintain pay equity.

12. In this case, the male comparator was found among the Employer's non-union staff. The Tribunal has already adverted to the fact that the Employer followed its usual practice and revised its salary grid for the non-union staff with the notable exception of the male comparator and the two jobs found to be equal

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1 see *Beef Terminal (1979) Limited* [1981] O.R.L.B. Rep. Mar. 244, par. 8

value to the nurse job class; to which it gave considerably less. Clearly an Employer can set salaries for staff with whom it does not have to collectively bargain. Had the Employer in this case chosen to give no increases to its management staff, it may not have been in violation of section 7(1) of the *Act*, since pay equity is established and maintained when the job rate of the female job class is at least equal to the rate of the male job class. Similarly, if after the regular management pay increases were given, the female job class had received a higher job rate when the pay equity adjustments combined with the regular collectively bargained adjustments were implemented, the Employer would not necessarily be under any obligation to further increase the non-union male salaries to match, since section 6(1) requires that the job rate for the female job class must be *at least* equal to the job rate of the male job class where the work is of equal or comparable value. However, in this case, all the non-union salaries were increased 5.5% or more, except those of the male comparator and two job classes of equal value. We find that the Hospital's explanation that the only reason these job classes received less was to hold them down to the nurse job rate, is not an acceptable explanation. This differential treatment had the impact of artificially holding back the nurses' job rate, negating the effect of the pay equity plan. As a result, we find that the Employer failed to maintain pay equity as required by section 7(1) of the *Act*.

13. Given our findings on sections 13(10) and 7(1), we find it is not necessary to decide the issue of whether the Employer violated section 9(1) of the *Act*.

*Order of the Tribunal*

14. Accordingly, the Tribunal upholds the Review Officer's finding with respect to her interpretation of the *Act*. The parties came to the Tribunal for an interpretation of these sections arising out of an honest disagreement. Given that this is a first interpretation of sections 13(10) and 7(1), we find it appropriate to direct the parties to meet within 30 days and attempt to agree on how the nurses' salaries will be adjusted to comply with the *Act* and this decision. We remain seized to order the appropriate remedy should the parties be unable to agree.

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**0173-91** Corporation of the City of Pembroke, Applicant v. Pembroke Police Association, Respondent

**Before:** Mary Ellen Cummings, Vice-Chair and Members Nicole LeClerc and Geri Sheedy

**Appearances:** Carole Piette, Ray Brazeau and C.A. Gauthier for the Corporation of the City of Pembroke; Clifford Wilson and Steven Carson for the Pembroke Police Association

**Cite As: Pembroke** (1991), 2 P.E.R. 157

**Pay Equity Process - Pay Equity Plan - Agreement**

**Pay equity negotiations between representatives of the City of Pembroke ("the City") and representatives of the Pembroke Police Association ("the Association") resulted in a memorandum of settlement. When the City presented the settlement to the Board of Commissioners of Police for the City of Pembroke ("the Board"), the Board did not approve the plan. The Association maintained that the Board was bound by the agreement.**

**The Tribunal held that the Board was bound by the agreement and ordered the parties to execute its terms.**

**The *Act* does not require that pay equity plans be ratified. In pay equity negotiations it is critical that parties know that the people they are negotiating with have the authority to negotiate the agreement, or if they do not, what steps are necessary to conclude a binding agreement. Unless a party makes clear that its agreement is subject to ratification, that agreement is valid within the meaning of the *Act*. The obligation to make clear the precondition of ratification falls on the party claiming the precondition. In this case, it was never clearly stated that ratification was required. The Tribunal is not satisfied that because ratification was previously required for collective agreements, the Association ought to have known that any pay equity agreement was subject to Board ratification.**

**Tribunal Member Nicole LeClerc Dissented:**

For one to claim that it was led to a particular belief by a party, the information which caused the belief must undoubtedly have led to that conclusion and that conclusion only. The Association was not led to believe that approval of the agreement had occurred. The Tribunal cannot bind the Board to an agreement it has not approved on the basis that the Association assumed it had been approved.

**Processus d'équité salariale – Programme d'équité salariale – Entente**

Les négociations entreprises dans le domaine de l'équité salariale entre les représentants de la ville de Pembroke («la Ville») et les représentants de l'Association de police de Pembroke («l'Association») ont abouti à l'adoption d'un mémoire de règlement. Quand la Ville a présenté ce mémoire à la Commission de police de la ville de Pembroke («la Commission»), celle-ci ne l'a pas approuvé. L'Association a soutenu que la Commission était liée par l'entente.

Le Tribunal a statué que la Commission était liée par l'entente et a ordonné aux parties d'exécuter l'entente.

La *Loi* n'exige pas que les programmes d'équité salariale soient ratifiés. Il importe, dans les négociations relatives à l'équité salariale, que les parties sachent que les personnes avec lesquelles elles négocient ont le pouvoir de négocier une entente. Dans le cas contraire, elles doivent savoir quelles mesures sont nécessaires pour conclure une entente ayant force exécutoire. Une entente conclue entre des parties est valide au sens de la *Loi* sauf si une partie précise bien que l'entente est sous réserve de ratification. Il incombe à la partie faisant valoir la condition de ratification d'en informer les autres parties. Dans le cas présent, on n'a jamais clairement précisé que la ratification de l'entente était nécessaire. Le Tribunal n'est pas convaincu que l'intimé aurait dû savoir, parce que toutes les conventions collectives antérieures étaient assujetties à cette règle de ratification, que l'entente en matière d'équité salariale était également subordonnée à la ratification de la Commission.

**Dissentiment de Nicole LeClerc, membre du Tribunal :**

Pour qu'une partie prétende qu'une autre partie l'a poussée à croire quelque chose, il faut que les renseignements qu'elle a reçus aient absolument abouti à cette conclusion et à rien d'autre. L'intimé n'a pas été porté à croire que l'entente avait été effectivement approuvée. Le Tribunal ne peut pas lier la Commission à une entente qu'elle n'a pas approuvée en faisant valoir que l'auteur de la requête présumait que l'entente avait été approuvée.

## DECISION OF MARY ELLEN CUMMINGS, VICE CHAIR AND GERI SHEEDY, MEMBER, JUNE 20, 1991

1. The Board of Commissioners of Police for the City of Pembroke (the "Board") made an Application to the Tribunal on February 9, 1991 with respect to an Order of a Review Officer dated January 2, 1991.

2. At the commencement of the hearing the parties agreed that the employer for the purposes of pay equity is the Corporation of the City of Pembroke (the "City"), therefore, by agreement, the Application and style of cause are amended accordingly.

3. At issue are the following:

> Did the parties reach agreement on the pay equity plan, in accordance with subsection 14(4) of the *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended, (the "*Act*") prior to the issuing of the Order?
>
> Is the Application to the Tribunal timely?
>
> Is the paid lunch provided to the male comparators a "benefit" within the meaning of the *Act*, which must be given to the comparable female job classes as part of their pay equity adjustment?

4. On the first day of hearing, the parties argued the first two issues as preliminary matters.

*Did The Parties Reach An Agreement?*

5. The facts are largely undisputed. The City and the Pembroke Police Association (the "Association") commenced pay equity negotiations early in 1990 for a bargaining unit composed of civilian members of the police force.

6. Although the City is the Employer, all pay equity negotiations were conducted between the Association and a group selected by the Board, not the City. However, there is no dispute that the Board

represented the Employer, the City, in these negotiations. The Board's negotiators were Ray Brazeau, Secretary to the Board; K.J. Nighbor, Special Advisor; and Paul Beaudry, a consultant. The Association was represented by Clifford Wilson, President; James Robichaud, Vice President and Steven Carson, Treasurer.

7. Fairly early on in the negotiations, the Association expressed some concerns about the authority of the Board's negotiating team, particularly about Mr. Beaudry. In past collective bargaining, the Board's negotiating team consisted of Board Commissioners, but in this case, no Commissioners were involved. Since the Association was accustomed to negotiating with Commissioners and not with an outside consultant, the Association wanted some clarification of the negotiating team's authority. Mrs. Nighbor subsequently advised the Association that Mr. Beaudry had been hired by the Board to negotiate pay equity with the Association.

8. Although the Association was not aware of it at the time, on February 27, 1990 the Board had passed a motion relating to the Association's concerns. The Board Minutes read as follows:

> Mrs. Nighbor explained that a meeting had been held with the Police Association and the City's consultant with respect to pay equity. There were some concerns expressed by the Association that the City's consultant was not authorised to negotiate pay equity with the Association and they wanted that point clarified.

9. In that meeting, the Board passed the following Motion:

> That Mr. P. Beaudry of P.I.R.C. be authorised to negotiate pay equity on behalf of the Pembroke Board of Police Commissioners.

10. As bargaining continued, the parties sought the assistance of a Review Officer. At a meeting with the Officer on July 17, 1990, a Memorandum of Settlement was signed. Paul Beaudry and Ray Brazeau signed for the Employer and Clifford Wilson, James Robichaud and Steven Carson signed for the Association. The Memorandum identified the male comparators for the two female job classes in the bargaining unit, set out the pay equity adjustments and the schedule for making the adjustments. It also stated that the Memorandum would form the basis of the pay equity plan.

11. On July 19, 1990, Mr. Brazeau wrote to Mr. Wilson, attaching an "Interim Pay Equity Report", requesting that Mr. Wilson review it "and advise if it meets with the Association's approval." He added that he would "attempt to arrange a special meeting of the Commission [the Board] and hopefully have the final report prepared for posting." On August 22, 1990, Mr. Brazeau wrote to Mr. Wilson again attaching the "Interim Report on Pay Equity". The letter said:

> Although the plan has been agreed to, I would appreciate your reviewing the format and content and advising if it meets your approval.

12. Although it was not expressly addressed in evidence, it appears that the document met with the Association's approval.

13. Sometime before September 5, 1990, Mr. Brazeau contacted Mr. Carson to say that there had been an error in the calculation of the adjustment for the female job classes. The parties met on September 5, 1990 and held a conference call with the Review Officer. The Memorandum of Settlement of July 17, 1990 was amended to reflect the new calculation. Sometime after that date, Mr. Brazeau again called Mr. Carson to discuss how the retroactive pay equity adjustment would be paid out. Mr. Brazeau proposed to pay it in a lump sum and the Association agreed. No amendment was made to the Memorandum.

14. On September 21, 1990, Mr. Brazeau submitted the "Final Report of the Pay Equity Program" to the Board for its approval at a September 24, 1990 Board meeting. The Board did not approve it.

15. The next day, Mr. Brazeau telephoned Mr. Wilson and informed him that the Board had not approved the pay equity plan and therefore, there was no agreed pay equity plan.

16. On January 2, 1991, a Review Officer ordered the Employer to post the pay equity plan that formed Appendix 1 to her Order. We have not seen that plan.

17. In his evidence, Mr. Brazeau stated that he had no authority to bind the Board. While the Board has no written policy setting out what matters must be approved by it before implementation, the Board tries to follow the written policy of the City which requires that contracts, tenders and financial expenditures of greater than $2000 be approved by City Council. The pay equity adjustments in the Memorandum of Settlement would increase the salaries of the female job classes by more than $2000 a year. Mr. Brazeau understood the Board's motion of February 27, 1990 gave the negotiating team the mandate to negotiate pay equity, but not to bind the Board to an agreement.

18. No witnesses were called by the Board who had personal knowledge of the Board's practice with respect to the ratification of collective agreements reached with the Association. In preparation for the hearing, Mr. Brazeau reviewed Minutes of the Board back to approximately 1982. He testified that the Minutes showed that the Board had ratified collective agreements negotiated with the Association. In the past, collective bargaining has been conducted by Board Commissioners without the assistance of outside consultants. Mr. Wilson confirmed that this had been the practice. We heard no other evidence on the parties' practice with respect to collective bargaining.

19. Mr. Brazeau also testified that his correspondence and telephone calls with the Association with respect to the "Interim Pay Equity Report" and the amendments to the pay equity adjustments and the schedule of payouts after the Memorandum of Settlement was signed, were done to ensure that everything was complete for his "Final Report of the Pay Equity Program" to the Board. When Mr. Brazeau was asked whether he ever advised the Association that ratification by the Board was required, he admitted that he could not be sure that he had. He said that he thought that it was understood.

20. As stated, the facts are not really in dispute. At issue however, is the consequences that flow from them. The Association argued that it was led to believe that the group that it was negotiating with had the authority to come to an agreement and that at no time was that authority said to be limited by a ratification requirement.

21. The Employer argued that the authority of its negotiating committee was limited to negotiating the agreement and that it had no authority to bind the Board. The Board maintained that the Association was never told that there was no requirement of Board ratification. Further, the Employer argued that Mr. Brazeau's letter of July 19, 1990 indicated that the pay equity plan would be taken to the Board and the Association's reliance on the statement in Mr. Brazeau's letter of August 22, 1990, that the plan had been "approved" indicates that the Association knew that the plan had to be approved by the Board before it would be implemented. The Employer argued that the Association mistakenly believed that the plan had been approved by the Board, and cannot now argue that it did not know that Board ratification was a necessary component of the bargaining process.

*Decision*

22. The *Act* contains no obligation that negotiating committees for either employers or bargaining agents seek ratification of a pay equity plan which has been agreed to before it can be implemented. Subsection 14(4) states:

> When an employer and a bargaining agent agree on a pay equity plan, they shall execute the agreement and, on or before the mandatory posting date, the employer shall post a copy of the plan in the workplace.

23. Parties may choose to make ratification of agreements reached by their negotiating committees part of their pay equity negotiations, but it is not a requirement of the *Act*. In a case such as this, the Tribunal must determine if the parties have reached agreement on a pay equity plan, within the meaning of subsection 14(4). The Tribunal must determine what negotiating process the parties agreed to. In this case, the Tribunal must determine if the parties understood that ratification by the Board was a precondition to their reaching agreement on a pay equity plan.

24. In pay equity negotiations it is critical that parties know that the people that they are negotiating with have the authority to negotiate an agreement, or if they do not, what steps are necessary to conclude a binding agreement. In pay equity negotiations, it is also critical that parties be able to determine when the process of bargaining has come to an end. The existence or non-existence of an agreed pay equity plan is vital to the parties' obligations under the *Act*. If an agreed plan exists, it is deemed approved by the Pay Equity Commission, under subsection 14(5), and the employer shall make the first adjustments required. If an agreed plan does not exist, a Review Officer may make an Order with respect to all outstanding matters under subsection 16(2). The existence or non-existence of an agreed plan determines the next steps in the pay equity process for the parties.

25. The Ontario Labour Relations Board (the "OLRB") has often been faced with the issue of determining whether the parties to collective bargaining negotiations have concluded a "collective agreement" within the meaning of subsection 1(1)(e) of the *Labour Relations Act*, R.S.O. 1980, c.228. On this issue, the Board has said in *Graphic Centre (Ontario) Inc.*, [1976] O.L.R.B. Rep. May 221 at paragraph 11:

> The parties, however, must know, with a high degree of certainty and predictability, precisely when they have entered into a collective agreement so as they may properly assume their respective duties and responsibilities and conduct themselves in a manner consistent with the existence of a subsisting agreement. It should be added that certainty in this regard minimises the amount of "litigation" which might otherwise come before the Board.

26. The principles that the OLRB has enunciated in this area are useful to the Tribunal. The interests inherent in the bargaining process for a collective agreement are similar to those underlying negotiations for a pay equity plan. Just as the existence of a collective agreement is often determinative of the rights and obligations of parties, so too is the existence or non-existence of a pay equity plan under the *Act*.

27. Under the *Labour Relations Act*, there is also no statutory obligation to ratify a collective agreement. In *Galdino Berdwsco*, [1977] O.L.R.B. Rep. Nov. 774, the OLRB had to determine whether a collective agreement existed in light of complaints about the ratification process that was carried out by the bargaining agent. The OLRB found that the employer and bargaining agent had not made their terms of settlement subject to ratification. At paragraph 10, the OLRB said:

> Ratification of the proposed terms of a collective agreement is not a requirement under the *Labour Relations Act* and thus even if no ratification occurred at the [union's ratification] meeting of May 13 (and we make no finding in this regard) this fact would not have affected the validity of the agreement. We would stress that the situation here differs from that where parties sign a memorandum of settlement subject to ratification. In such a situation ratification would be a condition precedent to the coming into being of the collective agreement, and thus the question as to whether or not such ratification had occurred would be crucial.

28. The reasoning of the OLRB in that case is equally applicable in the pay equity context. Unless a party makes clear that its agreement is subject to ratification, that agreement is a valid agreement within the meaning of subsection 14(4) of the *Act*. The obligation to make clear the precondition of ratification falls on the party claiming the precondition.

29. We find that in this case, the Employer never clearly stated that ratification was required before the parties' agreement could be binding on them. We find that the Association was advised of the need for Board ratification of the pay equity plan agreed to by the Employer and Association's negotiating committees for the first time on the day that it was told by Mr. Brazeau that the Board had not ratified the plan.

30. We are not satisfied that the Association ought to have known that any agreement reached was subject to Board ratification. To the extent that past practice in collective bargaining may be useful in determining the parties' expectations of the process of pay equity negotiations, we did not find that the evidence of past practice in this case was particularly helpful. While there was evidence that collective agreements between the Association and the Board had been ratified by the Board, we do not think that the Association should have understood that negotiating the pay equity plan would necessarily follow the same process. We reach this conclusion on the evidence that the Association raised concerns about the authority of the Employer's negotiators. The Association recognised that the Board appeared to be conducting pay equity negotiations differently from collective bargaining negotiations, that is, with a consultant instead of Commissioners. Those concerns were taken to the Board and answered by the Board's Motion of February 27, 1990. If Mr. Beaudry's authority was limited in some way, the Board should have said so. Having raised the concern about the authority of the Board's negotiators, the Association was not required to go further, particularly given that the onus was on the Board to clearly state the existence of a ratification precondition.

31. There was a further opportunity to limit the authority of the negotiating team when the Memorandum of Settlement was signed on July 17, 1990. Again, the Memorandum was not made subject to ratification. At no time was the Association advised that the people it was negotiating with did not have the authority to enter into a binding agreement.

32. We are not prepared to find that Mr. Brazeau's letters of July 19, 1990 and August 22, 1990 were enough to put the Association on notice that the Employer had to ratify the agreement before it would be implemented. Those letters do not indicate that approval of the Board was being sought. Further, the August 22, 1990 letter refers to the plan as already having been agreed to. When read together, the letters are ambiguous. If the Board intended to reserve for itself the right to ratify the pay equity plan, it would have had to have been much clearer, particularly given the history of the pay equity negotiations to that point.

33. We understand that our colleague, Ms. LeClerc sees the facts differently. She believes that the Association understood that the Board was required to ratify and that the case is really about a misunderstanding as to whether the Board had ratified before the letter of August 22, 1990 was sent to the Association. In support of that view, she relies on the testimony of Mr. Carson and the statement of the issue by the Review Officer. We simply do not belive that this evidence is as clear as she states it. Further, we are not prepared to rely on how the Review Officer has characterized the issue. At the risk of being repetitive, we emphasize that the obligation to make clear that ratification was required falls on the Board. We are not satisfied that the Board was clear enough about its intentions.

34. We find, therefore, that the parties had agreed to a pay equity plan, within the meaning of subsection 14(4) of the *Act* before the Review Officer issued her Order on January 2, 1991. That pay equity plan is found in the "Final Report of the Pay Equity Program " which Mr. Brazeau submitted to the Board on September 21, 1991. We wish to make it clear that we are in no way commenting on the contents of the pay equity plan. We do not know what it contains. It was not put before us in evidence, we have not seen it. We find only that it was the plan agreed to by the parties. Having found that a pay equity plan was agreed to, it follows that subsection 14(5) of the *Act* operates and the pay equity plan is deemed approved by the Pay Equity Commission. We order the parties to execute that agreement and we order the Employer to post it in the workplace.

35. Since we find that the parties had agreed to a pay equity plan before the Order was made, we revoke the Order dated January 2, 1991.

36. Because of our findings on the first preliminary matter, it is not necessary for us to decide whether the Application of the Employer to the Tribunal was timely. Further, it is not necessary to hear the merits of that Application and the remaining hearing dates are hereby cancelled.

## DECISION OF TRIBUNAL MEMBER, NICOLE LECLERC, JUNE 20, 1991

1. I do not concur with the decision of the majority. In order to express my reasons for arriving at a different conclusion, I find it useful to restate the issues as presented before the Tribunal.

2. The Board of Commissioners of Police for the City of Pembroke (the "Board"), filed an application for a hearing before the Tribunal on February 9, 1991 contesting an order of a Review Officer dated January 2, 1991.

3. The Pembroke Police Association (the "Association") raised the following preliminary objections at the hearing:

i) that the Board's application with the Tribunal was not filed in accordance with subsection 16(4) of the *Pay Equity Act, 1987* (the Act) in that it was filed after the 30 day period allowed for filing objections; and

ii) that the Association and the Board of Police Commissioners entered into an agreement respecting pay equity on July 17th, 1990 for the Association's members, and that the Board cannot now claim there was no agreement.

4. The Board advised the Tribunal that it was now only contesting the Review Officer's order on the following matter:

> Is the paid lunch hour provided to the male comparators to be considered as a benefit for the purposes of pay equity?

Consequently, the Board is not contesting other aspects of the pay equity plan ordered by the Review Officer.

5. The facts, as set out in the majority decision, are largely undisputed. To avoid repetition, I will therefore only comment on those which led me to a different conclusion with respect to the issues submitted for the Tribunal's consideration.

6. I will address the preliminary objection raised by the Pembroke Police Association with respect to an alleged agreement respecting pay equity.

*Have The Association And The Board Of Police Commissioners Entered Into An Agreement Respecting Pay Equity?*

7. First, I feel it is important to underline the nature of the memorandum of settlement signed by the parties on July 17, 1990. It is clear, in my view, that this memorandum constitutes the **basis** of the pay equity plan between the Board and the Association but not the pay equity plan itself. To this end, I quote the first paragraph of this memorandum which stipulates:

> 1. The parties agree to the attached to form the basis of the Pay Equity plan for the Corporation of the City of Pembroke and Pembroke Police Association.

8. This agreement, signed on July 17, 1990, does not constitute a pay equity plan in accordance with subsection 14(4) of the *Act*, nor did the parties expressly intend for it to be so. It forms the basis of the pay equity plan to be negotiated by the parties in that it contains only a portion of the document known as a pay equity plan. It identifies two female job classes and their male comparators, as well as the period of time allotted for the pay equity adjustments to be paid. A pay equity plan, following section 13 of the *Act*, is a much more comprehensive document than that which has been signed by these parties on July 17, 1990. This clarification is important because of the consequences attached by the majority decision to the binding effect of a pay equity plan concluded as per subsection 14(4) of the *Act*.

9. The second point I wish to address is the majority's statement that there was absence of notice to the Association with respect to the requirement for approval by the Board of the memorandum signed by its negotiators. The majority concludes the Board had never notified the Association of the requirement for ratification until it advised the association, on September 22, 1990 that the Board had not approved the "Final Pay Equity Report" containing the items agreed to in the memorandum of settlement.

10. In my view, this is incorrect. Mr. Brazeau wrote to Mr. Wilson, president of the Association on July 19, 1990, two days following the signature by the parties of the memorandum of settlement. To this letter he attached an "Interim Pay Equity Report" requesting that Mr. Wilson review it and advise if it met with the Association's approval. He adds that he would attempt to "arrange a special meeting of the Board and hopefully have a final report prepared for posting".

11. This letter is very significant and revealing of the true expectations of both parties. First, it confirms that what they had signed two days earlier did not constitute a pay equity plan ready for posting in accordance with subsection 14(4) of the *Act*. The request for the Association to review the "Interim Pay Equity Report" is a clear indication that Mr. Brazeau was in the process of preparing the document known as a "pay equity plan" following section 13 of the *Act* for Board approval. This was confirmed by Mr. Brazeau's testimony.

12. Furthermore, contrary to the majority's conclusion, I find this letter constitutes the first time the Association was expressly advised that the Board had retained the right to approve the agreements arrived at by its negotiators.

13. It is rather surprising that at this time neither the issue of ratification nor the issue of the alleged binding authority of the Board negotiators was raised by the Association. If it felt so strongly that it had already entered into a "binding agreement" with the Board on July 17, 1990 and that there was no requirement for the Board to approve the memorandum signed by the parties, why did the Association not react at this time to the letter expressly referring to the requirement for Board approval? Why was the question not even raised with Mr. Brazeau?

14. The evidence indicates the argument with respect to the binding effect of the memorandum signed on July 17, 1990 was only raised by the Association at the time it was advised, in September, that Board approval had not been granted. In my view, the Association never raised nor responded to the issue of the requirement for Board approval, whether through its submissions, or in evidence before the Tribunal at the Hearing. This silence is somewhat puzzling. I can only interpret this lack of intervention as a sign of acceptance by the Association of the terms of the letter and that the Association therefore had knowledge that approval by the Board of Commissioners of Police was required in these circumstances. In my view, at this point in their negotiations, both parties were aware and understood that the memorandum of settlement was subject to Board approval.

15. While on the issue of ratification, the majority states that the *Pay Equity Act* contains no obligation that either employers or bargaining agents seek ratification of a pay equity plan which has been agreed to before it can be implemented, relying on section 14(4) of the *Act*. Even though ratification is not a requirement of the *Act*, parties may choose to make ratification by their principals part of their pay equity negotiations. The *Act* does not stipulate the terms by which parties are to conduct their pay equity negotiations.

16. The evidence in this case reveals that these parties chose to conduct their pay equity negotiations in the same manner as they had conducted past negotiations. The only distinction between pay equity negotiations and past negotiations was in the parties mandated by the Board to conduct negotiations. This was the first time there were no Commissioners on the Board's negotiating team. The concern raised by the Association with respect to the pay equity negotiations was not related to the process but to the presence of an outside consultant in lieu of a Board Commissioner. The evidence submitted through Mr. Brazeau's testimony clearly indicates that past negotiated collective agreements had always been subject to Board approval. This was confirmed by Mr. Wilson, the Association's president who also added that in the past the Board had always approved agreements concluded by their negotiators. It is important to note that the fact that past agreements were always approved by the Board does not mean the Board had abandoned its right

to approve them. It may merely indicate that the presence of a member of the Board of Police at the negotiations table in the past, was more conducive to Board approval. In light of that, the Association could reasonably have expected that for the pay equity negotiations, since there was no Board member on the negotiating team, it was less likely that it would be approved but still subject to approval.

17. The second letter sent to Mr. Wilson by Mr. Brazeau on August 22, 1990 is in my view, the source of the problems arising in this case. This letter states:

> Attached is....."Interim Report on Pay Equity".... Although the plan has been agreed to, I would appreciate your reviewing the format and content and advising if it meets your approval.

18. Again to this letter, Mr. Brazeau attached the 'Interim Report on Pay Equity'. In my view, the disagreement between the parties stems from the interpretation given to this letter by the Pembroke Police Association. In his testimony, Mr. Steve Carson, secretary of the Association, said that he assumed, upon reading the words "although the plan has been agreed to", that the Board had approved the memorandum of settlement signed on July 17, 1990. Furthermore, the review officer's order confirms the Association's belief as follows:

> The Association's position was that it entered into an agreement with the Corporation of the City of Pembroke in good faith. It stated that after being informed that the agreement had been ratified, it was subsequently told it had been annulled.

19. Mr. Brazeau, Secretary for the Board testified that the words "have been agreed to" referred to the parties' agreement signed on July 17, 1990 with respect to the female job classes and their comparators that were to form the basis of the pay equity plan. Later in his testimony, he stated that he was not sure he had advised the Association that approval by the Board was required, and added he thought it was understood.

20. The outcome of this case rests on the consequences attached to the assumption entertained by the bargaining agent, that is the assumption that the Board had ratified the memorandum signed by the parties in July. Before attaching any consequence to the bargaining agent's assumption, the following might be useful to assess the issues in this case:

> Was it reasonable for the Association to come to this assumption in the circumstances?
>
> Can the Tribunal bind one party to an agreement it has not approved, based on the other party's assumption that approval of that agreement had occurred?

21. On the question of reasonableness of the assumption, it is acknowledged that the letter of August 22, 1990, sent to the Association by Mr. Brazeau could have led to confusion. However, I am not convinced that the letter is the only basis of the Association's assumptions. The fact that agreements had always been approved by the Board in the past contributed to the Association's belief that any agreement it signed with the Board negotiators, including that which it had signed on July 17, 1990 would necessarily follow that route. It assumed this agreement would not be an exception. In response to Mr. Brazeau's testimony, Mr. Wilson not only confirmed that past agreements had always been submitted to the Board for approval but felt it was necessary to add that they had always been approved. However, what is important to consider in the circumstances is not the outcome of the Board's past practice of retaining the authority to approve agreements signed by its negotiators but rather the existence and consistency of that process.

22. It is questionable whether the text of the August 22, 1990 letter is sufficiently clear for the Association to conclude that the signed agreement had been approved by the Board. Can the Association

claim it was led to believe, through the August 22, 1990 letter that the Board had ratified the memorandum signed by the parties and that the Board was as of that date bound by it?

23. For one to claim that it was led to a particular belief by a party, the information provided which caused the belief must undoubtedly have led to that conclusion and that conclusion only. If the information provided is unclear, contradictory, ambiguous, or conflicting with other elements in the circumstances, then, a party is expected to question the intent of the meaning or intent of the information it was provided with.

24. In this case, if the letter is found to be clear, unequivocal, consistent with other elements in these circumstances, and leaves the Association with no alternative but to conclude as it has, then I believe the Association can claim the terms of the letter led it to believe that approval had taken place and the Board should then bear the responsibility of having led to this belief. If, on the other hand, the letter is found to be unclear, ambiguous, contradictory and inconsistent with other elements in these circumstances, then the reasonable, responsible and expected behaviour of the Association is to verify the meaning and intent of the correspondence received rather than assume its meaning.

25. In this case, the content of the August 22, 1990 letter is not sufficiently clear and does not indicate that the Board has approved the parties' signed memorandum. The letter is not a clear indication that the Board's approval has occurred as it refers to and has appended to it an "Interim Pay Equity Report". Furthermore, in this letter the Board is seeking the Association's approval for format and content of a document called the "Interim Pay Equity Report"; this is an indication that the preparation of the necessary documentation for Board approval is still ongoing.

26. The Association was therefore not led to believe approval had occurred by the letter of August 22, 1990; the Association's belief is but a mere assumption that cannot be upheld by the Tribunal. Having not expressly been advised of Board approval, the bargaining agent had the obligation to make reasonable efforts to verify whether its assumptions were founded or not.

27. The Tribunal cannot bind the Board to an agreement it has not approved, on the basis that the Association assumed it had been. Nor can the Association, having awaited and later assumed ratification had occurred, now claim the agreement when signed on July 17, 1990, was binding and that ratification was not required.

28. In the absence of approval by the Board of Commissioners of Police of the July 17, 1990 Memorandum of Settlement, the parties had not entered into an agreement respecting pay equity. I find that in this case, both the employer and the bargaining agent had, as in past negotiations made their terms of settlement subject to ratification and that this ratification is a condition for the memorandum of settlement to become a Pay Equity plan within the meaning of section 14(4) of the *Act*. Therefore, this preliminary objection raised by the Association should be rejected.

**0166-91** Ontario Nurses' Association, Applicant v. Lady Dunn General Hospital, Respondent

**Before:** Raphael Palumbo, Vice Chair and Donald Dudar and Bruce Budd, Members

**Appearances:** Anne Marie Delorey, Pauline Lefebvre Hinton, Carol Styres and Carolyn Prepp for the Applicant, Ontario Nurses' Association; Allan Shakes and Shelagh Quigley for the Respondent, Lady Dunn General Hospital

**Cite As:** Lady Dunn General Hospital (1991), 2 P.E.R. 168

### Pay Equity Act - Adjustments - Benefits

The Applicant Union objected to a Review Officer's order requiring the Respondent Employer to equalize compensation between a female on male job class by providing the cash value for the difference in vacation entitlement rather than the increased vacation entitlement itself. The Respondent claimed that the order was correct and that what the Applicant sought would cause it undue hardship.

The Tribunal ordered the Respondent to increase the vacation entitlement for the members of the female job class to that of the male job class.

In order to achieve pay equity, the sum of all salaries or wages and benefits, if any, received by a female job class must be equal to the sum of all salaries or wages and benefits, if any, provided to its male comparator job class. The adjustment may be made to wages or salaries, to benefits, or to a combination of the two. In this case, there was no evidence that the collective bargaining process would be circumvented or that the Respondent would otherwise suffer undue hardship of the pay equity process resulted in a change of vacation entitlement for the female job class.

### PEHT - Remedies - Revocation of Orders

The Applicant objected to a Review Officer's order requiring the Respondent to equalize compensation between a female on male job class by providing the cash value for the difference in vacation entitlement rather than the increased vacation entitlement itself. The Respondent took the position that the Tribunal could not revoke or vary the Review Officer's order unless it violated the *Act*, or was incorrect in relation to the *Act*.

The Tribunal held that its role is not limited to determining whether the order is incorrect or contravenes the *Act*, and that it would deal with the original issue between the parties.

### Loi sur l'équité salariale - Rajustements - Avantages

L'auteur de la requête s'est opposé à l'ordre de l'agent de révision qui exigeait que l'intimé comble l'écart qui existait entre les congés payés accordés aux membres d'une catégorie d'emplois à prédominance féminine et ceux qui étaient accordés aux personnes appartenant à une catégorie d'emplois à prédominance masculine au moyen d'une prestation en espèces au lieu d'augmenter la durée des congés payés. L'intimé prétendait que l'ordre était correct et que la requête de l'auteur de la requête lui causerait un préjudice indû.

Le Tribunal a ordonné à l'intimé d'augmenter les congés payés des membres de la catégorie d'emplois à prédominance féminine pour qu'ils correspondent à ceux de la catégorie d'emplois à prédominance masculine.

Dans le domaine de l'équité salariale, il faut que l'ensemble des salaires et des avantages, le cas échéant, que reçoivent les personnes appartenant à une catégorie d'emplois à prédominance féminine soit égal à l'ensemble des salaires et des avantages, le cas échéant, versés aux membres de la catégorie d'emplois à prédominance masculine qui sert à la comparaison. Les rajustements peuvent être apportés soit aux salaires, soit aux avantages, soit à une combinaison des deux. Dans le cas présent, il n'était pas prouvé que le processus de négociation collective échouerait ou que l'intimé subirait autrement un préjudice indû si le processus d'équité salariale entraînait une modification des congés annuels accordés aux membres de la catégorie d'emplois à prédominance féminine.

### T.É.S. - Recours - Révocation des ordres

L'auteur de la requête a contesté l'ordre de l'agent de révision qui exigeait que l'intimé comble l'écart qui existait entre les congés payés accordés aux membres d'une catégorie d'emplois à prédominance féminine et ceux qui étaient accordés aux personnes appartenant à la catégorie d'emplois à prédominance masculine au moyen d'une prestation en espèces au lieu d'augmenter la durée des congés payés. L'intimé a adopté le point de vue selon lequel le Tribunal ne pouvait révoquer ou modifier l'ordre de l'agent de révision que si cet ordre enfreignait la *Loi* ou était incorrect par rapport à la *Loi*.

Le Tribunal a conclu que son rôle ne se limitait pas à décider si l'ordre était incorrect ou s'il enfreignait la *Loi*, et qu'il traiterait de la question originale soulevée par les parties.

## DECISION OF THE TRIBUNAL, JUNE 28, 1991

1. The Ontario Nurses' Association ("ONA") is objecting to an Order of a Review Officer which requires the Lady Dunn General Hospital (the "Hospital") to equalize compensation between a female and male job class by providing the cash value for the difference in vacation entitlement. The issue in this case is how to adjust the compensation paid to the nurse job class in order to achieve pay equity. In particular, is

pay equity between the nurse and manager of plant maintenance job classes to be achieved by way of a cash payment in lieu of an increase in vacation entitlement for the nurses?

2. ONA argued that its members ought to receive the increased vacation benefit "as of right". In the alternative, ONA requested that we exercise our discretion and order that, in the circumstances of this case, the compensation paid to its members be adjusted by ordering an increase in their vacation benefit. While we have doubts about the first argument, we dispose of the dispute before us on the second ground and it is therefore not necessary to decide the "as of right" question.

3. The Hospital objects to the Application. They argue that the Review Officer's determination is correct and ought not be changed, and that the order sought would result in undue hardship to the Hospital.

*Facts*

4. ONA is the bargaining agent for bargaining units of full-time, and part-time and casual registered nurses employed by the Hospital in Wawa, Ontario. There are 20 nurses in the bargaining units represented by ONA.

5. The Hospital operates on a 24 hour basis, and has 16 chronic care beds as well as 12 active beds for acute care patients. Acute care patients include patients with strokes, diabetes or heart conditions, cancer patients, patients requiring isolation for various infectious diseases and post-operative patients. There is also an emergency room and an operating room at the Hospital.

6. The nurses at the Hospital work 12 hour shifts, days and nights. On the day shift, there is one registered nurse in the emergency department for eight hours and two on the ward for 12 hours. The head nurse is also on duty for eight hours. On weekends, one nurse is on duty in the out-patient department for 8 hours while two nurses take their regular 12 hour shifts on the ward. One of these two nurses also assumes administrative duties since neither the ward clerk nor the pharmacist are on duty on weekends.

7. There are three categories of nurses in the bargaining units: full-time, and part-time and casual. Full-time and part-time nurses are listed on a master schedule which lists the shifts they are to work. Casual nurses fill in for the full-time and part-time nurses when required.

8. ONA and the Hospital were negotiating a pay equity plan and agreed that the nurse job class was comparable in value to the manager of plant maintenance. The difference in wages between the two job classes is $0.20 per hour, and it was agreed that an adjustment in that amount would be made to the compensation paid to the nurse position. The parties also found that there was a difference in vacation entitlement between the two job classes. The manager of plant maintenance is entitled to a vacation benefit of:

4 weeks after 1 year of service
5 weeks after 8 years of service
6 weeks after 17 years of service

The vacation entitlement for nurses under the relevant collective agreement is:

3 weeks vacation after 1 year of service
4 weeks vacation after 3 years of service
5 weeks vacation after 15 years of service
6 weeks vacation after 25 years of service

The vacation entitlement for part-time registered nurses is calculated on the basis of the number of hours of service. Every 1500 hours worked is equivalent to one year of service.

9. This case is not complicated by the difficulty in calculating the benefit in monetary terms. It was agreed that the difference in vacation entitlement is $0.39 per hour. The Hospital proposed to pay this amount to the nurse position in lieu of the increased vacation benefit. ONA proposed that its members receive the same vacation benefit as the manager of plant maintenance rather than the cash. The parties agreed that a further adjustment in favour of nurses was required but could not agree on the method of making this adjustment.

10. When the dispute could not be resolved, ONA applied to the Pay Equity Commission; a Review Officer was appointed to investigate the matter and to endeavour to effect a settlement. Ultimately, the Review Officer issued an Order which provided:

> It is my opinion that the *Pay Equity Act, 1987*, although recognizing that benefits are to be included in the calculation of compensation, does not intend to cause undue hardship to employers. In this case, adjusting the vacation schedule as opposed to paying the value of the vacation in wages would cause such undue hardship.
>
> I hereby order that the Employer and Union calculate the actual monetary worth of the vacation benefit. This amount is to be added to the $0.20 per hour pay differential to determine the total hourly adjustment required to achieve pay equity...

*Arguments and the Law*

11. Subsection 30(1) of the *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended (the "*Act*") confers upon the Tribunal the exclusive jurisdiction to determine all questions of fact or law that arise in any proceeding before it. The issue before us is how the compensation of the nurse job class is to be adjusted. That is a question of law, requiring us to consider and interpret the provisions of the *Act* and to apply them to the facts of this case.

12. The term compensation is defined in subsection 1(1) of the *Act* to mean:

> all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount.

Clearly, a distinction has been made between payments received by employees in the form of salaries or wages, and benefits provided to those employees. However, the compensation provided to any job class is a combination or sum of salaries or wages, and benefits, if any, provided to that job class.

13. Subsection 6(1) outlines when pay equity is achieved:

> For the purposes of this *Act*, pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value.

Job rate is defined in subsection 1(1) as "the highest rate of compensation for a job class". Where two job classes are of equal or comparable value their job rate must be equal, and job rate is defined in terms of the highest rate of compensation for a job class. Therefore, in order to achieve pay equity, the sum of all salaries or wages, and benefits, if any, received by a female job class must be equal to the sum of all salaries or wages, and benefits, if any, provided to its male comparator job class.

14. In our view, where the compensation paid to a female job class must be adjusted to achieve pay equity, that adjustment may be made to wages or salaries, to benefits, or to a combination of the two. If equal compensation has been achieved through an adjustment in any of these ways, then pay equity under the *Act* has been achieved. Since the parties have failed to resolve this matter by negotiation, the question for the Tribunal in this case is what type of an adjustment must be made to the compensation provided to ONA's members in order that pay equity be achieved.

15. As we indicated earlier, the Review Officer ordered that pay equity in this case would be achieved by calculating the monetary worth of the vacation schedule and adding that amount to the $0.20 per hour pay differential. The Hospital takes the position that unless the Order violates the *Act*, or is incorrect in relation to the *Act*, then the Tribunal cannot revoke or vary the Order.

16. In our view, our role is not limited to whether the Order is incorrect or whether it contravenes the *Act*. Rather, we are to deal with the original issue between the parties, which is how the compensation of the nurses employed by the Hospital is to be adjusted in order to achieve pay equity. The hearing before us is *de novo*. That is, we will take a fresh look at the issues before us rather than treat this matter as an appeal from the Review Officer's Order. In *Cybermedix Health Services Limited* (1990), 1 P.E.R. 41 at Page 45, the Tribunal described the process as follows:

> In contrast, section 25 of the *Pay Equity Act, 1987* requires the Tribunal to hold a hearing and to comply with the provisions of the *Statutory Powers Procedure Act*. This proceeding is not an appeal from a review officer's order, but is rather, a hearing *de novo* on the issues in dispute. For example, the only information the Tribunal had about this case from the Pay Equity Office is the order of the review officer. Evidence on issues in dispute must be called at the hearing by the parties and be subject to cross–examination. The Tribunal will assess the credibility of witnesses and determine the weight to be given to the evidence. To turn these proceedings into an appeal of a review officer's order would be contrary to the intent of the statute, would have the negative impact of judicializing the review services process and would take away their primary focus on mediation and settlement. Therefore, these proceedings will be hearings not appeals, and the decisions of the Tribunal will be made based on the evidence presented at the hearing.

17. The Hospital further argued that if we awarded the nurses an increase in their vacation entitlement the collective bargaining process would be circumvented. At the present time the ONA local and the Hospital participate in a centralized bargaining process, the outcome of which is standardization among hospitals of the vacation entitlement. If the vacation entitlement for nurses at this Hospital were increased, a superior condition would be created. Nurses at this Hospital would receive a greater vacation entitlement than other nurses who fall under the same collective agreement. The Hospital's position is that the vacation entitlement ought to flow from the collective bargaining process so that it is standard for all nurses under the centrally negotiated collective agreement.

18. No evidence was led by the Hospital as to how the collective bargaining process would be circumvented if the pay equity process resulted in a change of the vacation entitlement for ONA's members at the Hospital. In fact, the only evidence respecting the centralized bargaining process was that the Hospital participates in that process along with approximately 175 other hospitals in the Province.

19. As well, given that the *Act* requires a separate pay equity plan for each bargaining unit in an establishment, salaries and wages, or benefits for nurses in hospitals throughout the province may be different depending on the male comparators chosen in each hospital. Since the parties here are not

engaged in central bargaining for pay equity, and given the process established under the *Act*, there is no guarantee that standardization of matters negotiated under the central collective bargaining process will be maintained.

20. The *Act* also envisions changes in the relevant collective agreement as a result of the pay equity process. Subsection 13(10) of the *Act* provides:

> (10) A pay equity plan that is approved under this Part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements.

It appears therefore that the *Act* anticipated that regardless of the contents of an existing collective agreement, any adjustments made to the compensation paid to the female job classes simply become part of the collective agreement. While we recognize that some difficulties may arise as a result of a lack of standardization in compensation from hospital to hospital in Ontario, there was no evidence led as to what those difficulties might be.

21. It is acknowledged by both parties that if ONA were successful in its application, only nine of its members would receive the additional vacation entitlement immediately, since the other nurses would not have met the required number of years of service which would entitle them to an increase in vacation time. If however, the vacation entitlement were adjusted by way of a payment in lieu of increased vacation time, all nurses would benefit immediately by an increase in compensation of $0.39 per hour (over and above the $0.20 pay increase already agreed to). The Hospital argued that this should be a factor in deciding that the compensation provided to ONA's members ought to be adjusted by way of an hourly cash payment.

22. The question of whether or not all of the nurses can take immediate advantage of the increased vacation benefit is distinct from whether they ought to receive such an increase in lieu of a cash payment. In any event, the fact that each and every nurse could not exercise that benefit immediately does not mean that they would not be entitled to the increased benefit. They would be, but the exercise of each nurse's right to the benefit depends on meeting the relevant service requirements. This is analogous to the position of the manager of plant maintenance who is entitled to the vacation schedule set out above, but who can only take 6 weeks of vacation after completing 17 years of service at the Hospital.

23. Another matter raised by the Hospital is the effect of subsection 9(3) on how adjustments in compensation are to be made. Subsection 9(3) provides that

> (3) Where, to achieve pay equity, it is necessary to increase the rate of compensation for a job class, all positions in the job class shall receive the same adjustment in dollar terms.

Does this provision mean that adjustments to compensation may only be made by monetary payments, thereby eliminating the possibility that adjustments in compensation may occur by adjusting benefits provided to a job class?

24. The Hospital argued that to achieve pay equity all positions in a job class are to receive the same adjustments in dollar terms. This would mean that all nurses would immediately receive an increase of $0.39 per hour in compensation regardless of the nurses' years of service. The Hospital's position is that subsection 9(3) of the *Act* requires it to give the same adjustments to all nurses, and that since it must be "in dollar terms", everyone must receive the same monetary increase. This approach cannot be used if the

vacation entitlement is adjusted in the manner requested by ONA, since not all nurses are now entitled to the same vacation benefit.

25. In our view, subsection 9(3) provides that where compensation is increased by way of a payment to a job class, each position in that job class must receive the same monetary increase. In other words, it is not permitted to pay one position in a job class an adjustment of $0.25 per hour while another position in that job class receives a $0.32 per hour increase. In our view, subsection 9(3) is not determinative of the issue before us.

26. The Hospital argued that to increase the vacation entitlement would cause it hardship. It was alleged that there was a nursing shortage in Wawa, and that it would be difficult to schedule nurses for the increased vacation time if ONA's application were successful. The difficulty here is that no evidence of a staffing problem was led by the Hospital. There is simply no evidentiary basis for the argument that there is a shortage of nurses in Wawa, and that there would be an adverse impact on the Hospital should ONA's application be successful.

27. The Hospital also argued that there is a cost for replacing the nurses who would be entitled to take increased vacation time. Not only would the Hospital have to pay the replacement nurses, but there would also be the cost of the premium if they worked overtime. While this is no doubt true, there was no evidence led respecting the anticipated cost of paying replacement nurses as a result of increasing the vacation entitlement of ONA's members, nor what the anticipated effect of that cost would be on the Hospital.

28. ONA's members have taken the position with the Hospital that they wish to receive the increased vacation time as opposed to the cash payment, although there was evidence that not all of the nurses take the vacation time to which they are entitled. Their reasons for opting for the increased vacation benefit are set out below. In essence, they argued that the increased vacation time would assist them in relieving or coping with the stress associated with their work. In turn, the stress is a result of a number of different factors.

29. Ms. Carol Styres, a registered nurse since 1974 and president of the ONA part-time local at the Hospital, testified as to the causes of some of the stress felt by nurses at the Hospital. The family lives of the nurses are disrupted by the fact that they work shifts, weekends and holidays. She stated that increased vacation time would allow nurses to spend more time with their families.

30. Other factors contribute as well. It is apparently difficult for nurses in Wawa to keep abreast of the administration of new medications and the operation of new equipment, although the frequency with which nurses must cope with this problem varies. At times, nurses at the Hospital care for patients who, in other hospitals, would be cared for in specialized units such as cardiac care facilities. There are also occasions, on the night shift for example, when only one nurse is left to care for patients on the ward since the other nurse must care for patients who arrive at the emergency department. Time constraints caused by this situation often mean that patient comforting, emotional care and health teaching on the ward are not always provided. Finally, Ms. Styres indicated that nurses are subject to verbal abuse from patients on a regular basis.

**DECISION:**

31. In the absence of any evidence that amending the compensation paid to the nurses at the Hospital by increasing their vacation entitlement would cause the Hospital hardship, we are prepared to grant ONA the remedy it seeks in this case.

32. In the end, the evidence before us, which was uncontradicted and credible, leads us to the conclusion that in the circumstances of this case, it is reasonable to adjust the compensation paid to ONA's members at the Hospital by increasing their vacation benefit to the level enjoyed by the manager of plant maintenance.

33. Accordingly, the Order of the Review Officer dated October 26, 1990 is revoked. Pursuant to subsection 25(2)(g), the Tribunal orders the Hospital to increase the vacation benefit provided to ONA's members to the level provided to the manager of plant maintenance.

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**0184-91 0185-91** The Hospital for Sick Children, Applicant v. Jane Ciordas and Tanya Magee and a group of General Duty Registered Nurses, Respondents; The Hospital for Sick Children, Applicant v. Cynthia Davey, Terry Tew, Angie Holzmueller, Christina Bera, and Helena Hutton, Respondents

**Before:** Beth Symes, Chair and Members Bruce Budd and Janet Slone Taylor

**Appearances:** Janice Baker, Ann Burke and Christina Sass-Kortsak for the Hospital for Sick Children; Leslie Dizgun for Jane Ciordas and Tanya Magee; No one appearing for the remaining General Duty Registered Nurses; No one appearing for Cynthia Davey, Terry Tew, Angie Holzmueller, Christina Bera, or Helena Hutton

**Cite As: Hospital for Sick Children** (1991), 2 P.E.R. 174

**PEHT - Jurisdiction - Costs**

**PEHT - Jurisdiction - Appointment of Agent**

**A group of nurses employed by the Applicant Hospital objected to the pay equity plan posted by the Hospital. A review officer issued an order requiring the Hospital to amend the plan and adjust the job rate for registered nurses. The Hospital objected to the order and requested a hearing before the Tribunal. Two of the Respondent nurses asked the Tribunal (1) to order the Hospital to fund their costs of defending the review officer's order before the Tribunal; or in the alternative, (2) to appoint an agent to represent them at the Tribunal or to name the Pay Equity Office ("the Office") as their agent. The issue was whether the Tribunal had the jurisdiction to make any of these orders.**

**The Tribunal held that it had no jurisdiction to order the Hospital to fund the pay equity litigation of the nurses. It also declined to appoint an agent to represent the nurses, or to name the Office as their agent.**

**The Tribunal's jurisdiction flows from the *Act*. A tribunal's authority to make an order awarding costs is limited to what is specified in its governing statute. There is nothing in the *Act* nor in any other statute which authorizes the Tribunal to make an interim order for costs.**

**Section 32(3) of the *Act* enables employees and groups of employees to choose an agent to act on their behalf. It assumes that the person named agrees to act as agent. It does not envisage that the Tribunal would select someone to act as agent and it is difficult to imagine how the Tribunal would make such a choice. The Respondents have not asked the Office to act as their agent. The Registrar gave notice of these proceedings to the Office, which advised the parties that it would not be participating. The Tribunal will not name the Office as agent.**

**T.É.S. - Compétence - Dépens**

**T.É.S. - Compétence - Nomination d'un mandataire**

**Un groupe d'infirmières qu'emploie l'hôpital qui constitue la partie requérante a contesté le programme d'équité salariale qu'a affiché l'hôpital. Un agent de révision a ordonné à l'hôpital de modifier son programme et de rajuster le taux de catégorie des infirmières autorisées. L'hôpital s'est opposé à cet ordre et a demandé de se faire entendre devant le Tribunal. Deux des infirmières ont demandé au Tribunal d'ordonner à l'hôpital de payer leurs dépens en ce qui concerne la défense de l'ordre de l'agent de révision devant le Tribunal ou, subsidiairement, de nommer un mandataire chargé de les représenter devant le Tribunal ou de nommer le Bureau d'équité salariale («le Bureau») en tant que leur mandataire. Le Tribunal devait décider s'il était compétent pour donner ces ordres.**

Le Tribunal a statué qu'il n'était pas compétent pour ordonner à l'hôpital de payer les frais juridiques des infirmières. Il a également refusé de nommer un mandataire pour représenter les infirmières ou de nommer le Bureau comme mandataire. Les pouvoirs du Tribunal découlent de la *Loi*. Le pouvoir d'un tribunal administratif de rendre une ordonnance en matière de dépens est limité par le texte de la loi qui le régit. La *Loi* ni aucune autre loi n'autorise le Tribunal à rendre une ordonnance provisoire en matière de dépens.

Le paragraphe 32 (3) de la *Loi* autorise un employé ou un groupe d'employés à choisir un mandataire qui agira en leur nom. Il suppose que la personne nommée accepte cette charge. Il n'envisage pas la nomination d'un mandataire par le Tribunal et il est difficile d'imaginer comment le Tribunal pourrait faire un tel choix. Les intimées n'ont pas demandé au Bureau d'agir en tant que mandataire. Le greffier a avisé le Bureau de ces démarches et celui-ci a informé les parties qu'il ne participerait pas à l'instance. Le Tribunal ne nommera pas le Bureau comme mandataire.

## DECISION OF THE TRIBUNAL, JULY 3, 1991

1. A group of nurses employed by the Hospital for Sick Children (the "Hospital") objected to the pay equity plan prepared and posted by the Hospital. A Review Officer was appointed and met with the parties to investigate the matter. He was unable to effect a settlement and issued an order on January 4, 1991 with respect to the nurses which required the Hospital to amend the pay equity plan and to adjust the job rate of registered nurses by $7,429.50 per annum.

2. A group of Assistant Clinical Co-ordinators employed by the Hospital objected to the pay equity plan prepared and posted by the Hospital. A Review Officer was appointed and met with the parties. He was unable to effect a settlement and issued an order on January 4, 1991 with respect to this job class which required the Hospital to amend the pay equity plan and to adjust the job rate of the Assistant Clinical Co-ordinators by $16,867.50 per annum.

3. The Hospital objected to both of these orders and requested a hearing before the Tribunal.

4. These matters were listed together for hearing. Notices of these applications were posted in conspicuous places in the Hospital where they were most likely to come to the attention of the employees affected and copies of the notice were sent to all affected employees who had left the Hospital since January 1, 1990.

5. On the first day of hearing, Jane Ciordas and Tanya Magee, two of the Respondent nurses employed by the Hospital, (the "Nurses") asked the Tribunal to order the Hospital to fund their costs of defending this Review Officer's order before the Tribunal.

6. In the alternative, the Nurses asked the Tribunal to appoint an agent to represent them at the Tribunal or to name the Pay Equity Office as their agent. In the further alternative, the Nurses asked the Tribunal to order the Hospital to let them use the mailing lists and the distribution system of the Hospital to advise all nurses of the Hospital's application to the Tribunal in order to seek financial contribution from them. The Nurses asked the Tribunal to order the Hospital to deduct from the pay of nurses the sum of money each nurse might pledge for this case. Finally, the Nurses requested the Tribunal to order the Hospital to provide the Committee of Nurses with time and space at the Hospital to hold a meeting of nurses.

7. The Hospital took the position that the Tribunal had no jurisdiction to make any of these orders.

### Funding the Pay Equity Litigation

8. Counsel for the Nurses said that the Tribunal had the jurisdiction to order the Hospital to fund the pay equity litigation of his clients because of the special nature of the legislation, which he said, is an affirmative action plan to remedy systemic discrimination in compensation. He stated that for non-unionized employees, this statute is similar to human rights legislation and does not have a labour

relations component. He urged the Tribunal to interpret the *Pay Equity Act*[1] in a manner consistent with the rights and guarantees set out in the *Canadian Charter of Rights and Freedoms*[2] .

9. Counsel for the Nurses stated that in a union setting, the *Act* obliges the employer and the bargaining agent to negotiate in good faith and endeavour to agree upon a gender neutral job comparison system and a pay equity plan for the bargaining unit[3] . Therefore, unionized employees have their bargaining agent as an advocate for their interests in the pay equity process.

10. Counsel for the Nurses stated that, in contrast, 72% of the female workforce is not unionized and non-unionized women earn significantly less than unionized women[4] . Hence non-unionized women are likely to be the most disadvantaged by the effects of wage discrimination and they lack the collective bargaining resources to realize their pay equity rights.

11. Counsel for the nurses submitted that the scheme for enforcing rights under the *Pay Equity Act* has an adverse impact on non-unionized women. That scheme provides that their employer prepare and post a pay equity plan for the workplace and then individuals or groups of individuals may object to the posted plan. If the employer files an application for hearing with the Tribunal, non-unionized women workers are faced with financing time consuming and expensive pay equity litigation. The Nurses said that they are unable to fund this litigation and therefore lack the means to realize their rights under the *Act*. Counsel asserted that non-unionized women workers are a disadvantaged group and therefore entitled to the equality protections found in section 15 of the Charter[5] . Counsel stated that the Nurses must have not only the opportunity to be heard, but also the actual ability to be heard. He maintained that this right can be realized only if the Hospital is ordered to fund the Nurses' pay equity litigation. He stated that in interpreting the statute, the Tribunal has the jurisdiction to make an order so that the Nurses will be able to participate in the hearing and to test the Hospital's objection to the Review Officer's order.

12. Counsel for the Nurses pointed to three statutory sources of jurisdiction for such a funding order. First, the Tribunal may make rules for the conduct and management of its affairs and for the practice and procedure to be observed in matters before it[6] . Second, the Tribunal may order a party to a proceeding to take such action as is required in the circumstances[7] . Third, the Tribunal may make such orders to prevent abuse of its processes[8] . Counsel submitted that taken together, these provisions enable the Tribunal to interpret its statute so as to order the Hospital to fund the litigation of the Nurses so that they can effectively exercise their rights under the *Act*.

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1 *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended

2 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

3 *Pay Equity Act*, supra, s.14(2)

4 *Labour Unions/Syndicats 1988*, Statistics Canada, Chart 1.25a, p.42 *Canada's Women: A Profile of Their 1987 Labour Market Experience*, Labour Market Activity Survey

5 *Andrews v. Law Society of British Columbia*, [1989] S.C.R. 143 at p.152

6 *Pay Equity Act*, supra, s.29(2)(b)

7 *Pay Equity Act*, supra, s.25(2)(g)

8 *Statutory Powers Procedure Act*, R.S.O. 1980, c.484, s.23(1)

13. The Tribunal accepts the submissions of the Hospital. The Nurses are seeking an interim order from the Tribunal which would require that the Hospital pay their legal costs in this proceeding. Costs is a well-defined legal term and has the following characteristic:

(1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.

(2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.

(3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

(4) They are not payable for the purpose of assuring participation in the proceedings.[9]

Costs are defined to include legal fees, expert fees and disbursements.

14. The jurisdiction of the Pay Equity Hearings Tribunal flows from its governing statute, the *Pay Equity Act, 1987*. The Courts have been very clear that a Tribunal's authority to make an order awarding costs is limited to what is specified in its governing statute[10] . This limitation is equally applicable to human rights tribunals as to other statutory bodies[11], even if the Hearings Tribunal were to be characterized as a human rights tribunal. There is nothing in the *Pay Equity Act* nor in any other statute which authorizes this Tribunal to make an interim order for costs. The Charter does not assist the Respondents in their request. Therefore, the Tribunal has no jurisdiction to order the Hospital to fund the pay equity litigation of the Nurses.

15. How non-unionized women realize their rights under a statute is a choice of the legislature[12]. With respect to this statute, the government announced the creation of a pay equity advocacy clinic to assist non-unionized women workers. The Ministry of Labour entered into an agreement with Parkdale Community Legal Services, a community based legal aid clinic, to provide these advocacy services in the interim. These services may be available to the Respondents.

16. The Respondents are members of the Registered Nurses' Association of Ontario (R.N.A.O.) and have professional insurance under the Legal Assistance Plan. This may be another source of funding for the Nurses.

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9 *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. et al.* (1985), 51 O.R. (2d) 23 (Div.Ct.) at p.32

10 *Re Lachowski and Federated Mutual Insurance Co.* (1980), 29 O.R.(2d) 273 (Div.Ct) *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. et al.*, supra *Re Ontario Energy Board* (1985), 51 O.R.(2d) 333 (Div.Ct)

11 *The Liquor Control Board of Ontario(L.C.B.O.) and Parker v. Ontario Human Rights Commission* (1988), 9C.H.R.R. D/4868 (Div.Ct)

12 Following the decisions of the Divisional Court in 1985, the Legislature enacted the *Intervenor Funding Project Act, 1988* S.O.1988 c.71 which authorizes a funding panel to order a p roponent to fund the participation of intervenors before the Ontario Energy Board, the Environmental Assessment Board and a board established under the *Consolidated Hearings Act, 1981*.

**Appointment of Agent**

17. In the alternative, Counsel for the Nurses asked the Tribunal to appoint an agent to act on behalf of the Respondents. In the further alternative, he asked the Tribunal to appoint the Pay Equity Office to act as their agent.

18. The Act provides in s.32(3)

> An employee or a group of employees may appoint any person or organization to act as the agent of the employee or group of employees before the Hearings Tribunal or before a review officer.

19. This provision enables employees and groups of employees to choose an agent to act on their behalf. It assumes that the person named agrees to act as agent. It does not envisage that the Tribunal would select someone as agent and it is difficult to imagine how the Tribunal would make such a choice.

20. The Respondents have not asked the Pay Equity Office to act as their agent. As a result of the issues raised in the Pre-Hearing Memorandum of Agreement, the Registrar gave notice of these proceedings to the Pay Equity Office. Legal Counsel for the Office acknowledged the notice and advised the parties that the Office would not be participating in this proceeding. For the reasons stated above, the Tribunal will not name the Pay Equity Office as agent for the Respondents.

**Other Remedies**

21. The parties did not provide the Tribunal with sufficient assistance to enable it to deal with the remaining remedies sought by the Nurses. If the parties are unable to resolve these issues, they may be raised at the next day of hearing.

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**0188-91** Ontario Nurses' Association, Applicant v. Women's Christian Association of London, Operator of the Parkwood Hospital, Respondent

**Before:** Patricia Hughes, Alternate Chair, and Members Bruce Budd and Donald Dudar

**Appearances:** Anne Marie Delorey, Pauline Lefebvre-Hinton, Ian Galbraith, Terri Labate and Cheryl Legg for the Applicant, Ontario Nurses' Association; Bryan O'Byrne, Mona Anis, Brad Hollister for the Respondent, Women's Christian Association of London, Operator of the Parkwood Hospital

**Cite As: Parkwood Hospital** (1991), 2 P.E.R. 178

**PEHT - Jurisdiction - Canadian Charter of Rights and Freedoms**

**Interpretation - Application of Charter**

A Review Officer issued an order based on s. 6 of the *Act*. The Applicant Union requested a hearing before the Tribunal with respect to that order and claimed that the Officer's interpretation of s. 6 contravened the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). The issue was whether the Tribunal had the jurisdiction to hear the *Charter* challenge.

The Tribunal held that it had the jurisdiction to hear the challenge and apply the *Charter* to the *Act*.

The Supreme Court of Canada ("the Court") in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 ("*Cuddy Chicks*"), held that the Ontario Labour Relations Board ("the Board") has the jurisdiction to apply the *Charter*. Its jurisdiction to do so arises both from its powers under its own enabling statute to decide "all questions of law" in matters properly before it, as well as from s. 52(1) of the *Constitution Act, 1982*, which requires the Board in applying the law to ensure that it is constitutionally valid. To apply the *Charter* a tribunal must have jurisdiction over the whole of the matter before it: the parties; the subject matter; and the remedy sought.

The Court also confirmed two restrictions on the power of tribunals to apply the *Charter*. The first is that the effect of s. 52 is restricted to the case before the tribunal: the tribunal's finding of "no force or effect" can affect only the parties involved in the particular case. The second is that the tribunal's decision in *Charter* cases is not subject to curial deference.

The requirements established by the Court in *Cuddy Chicks* are met by the Tribunal in the circumstances of this case. Under s. 30 of the *Act* the Tribunal has the power to "determine all questions of fact or law that arise in any matter before it". The power

to interpret law confers a concomitant power to determine whether that law is constitutionally valid. The Tribunal has jurisdiction over the whole of the matter before it: the parties (the Employer and the Union); the subject matter (the appropriate male comparator under s. 6); and the remedy sought (to refuse to give effect to s. 6 or portions of it).

The Union asked that the Tribunal "amend" s. 6 of the *Act* to comply with the *Charter*, but agreed with the Employer that the Tribunal could not do so unless it had jurisdiction under s. 24(1) of the *Charter*. It was not clear to the Tribunal that it had the power to amend legislation, nor that the appropriate remedy in this case would be to "amend" s. 6. It therefore reserved on whether the Tribunal has jurisdiction under s. 24(1) of the *Charter*.

**T.É.S. – Compétence – Charte canadienne des droits et libertés**

**Interprétation – Application de la Charte**

Un agent de révision a donné un ordre fondé sur l'article 6 de la *Loi*. Le syndicat constitué partie requérante a demandé une audience devant le Tribunal relativement à cet ordre et a prétendu que l'interprétation de l'article 6 par l'agent enfreignait la *Charte canadienne des droits et libertés* («la *Charte*»). Le Tribunal devait décider s'il était compétent pour entendre la cause relative à la *Charte*.

Le Tribunal a statué qu'il était compétent pour entendre l'affaire et appliquer la *Charte* à la *Loi*.

Dans l'affaire *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5 («*Cuddy Chicks*»), la Cour suprême du Canada («la Cour») a statué que la Commission des relations de travail de l'Ontario («la Commission») était compétente pour appliquer la *Charte*. Ce pouvoir découle des deux sources suivantes : 1) le pouvoir que confère sa loi habilitante en ce qui concerne «toute question de droit» soulevée à l'occasion d'une question dont elle est correctement saisie; et 2) le paragraphe 52 (1) de la *Loi constitutionnelle de 1982*, qui exige que la Commission, lorsqu'elle applique la loi, s'assure de sa constitutionnalité. Afin d'appliquer la *Charte*, un tribunal administratif doit avoir compétence sur toute l'affaire dont il est saisi: les parties, l'objet de l'affaire et le recours demandé.

La Cour a également confirmé deux restrictions frappant le pouvoir dont dispose les tribunaux administratifs en matière d'application de la *Charte*. Premièrement, le paragraphe 52 se limite à l'affaire dont est saisi le tribunal : si le tribunal conclut qu'une disposition n'a «ni effet ni valeur», cette décision ne peut s'appliquer qu'aux parties à l'instance en question. Deuxièmement, la décision du tribunal en ce qui concerne toute affaire liée à la *Charte* ne fait pas l'objet d'une retenue judiciaire.

Le syndicat a demandé au Tribunal de «modifier» l'article 6 de la *Loi* afin qu'il soit conforme à la *Charte*, mais il a convenu, avec l'employeur, que le Tribunal ne pouvait pas donner suite à cette demande s'il n'était pas compétent pour ce faire en vertu du paragraphe 24 (1) de la *Charte*. Le Tribunal n'était pas certain qu'il avait le pouvoir de modifier la loi ou que le recours convenable dans les circonstances était de «modifier» l'article 6. Par conséquent, il a pris sous réserve sa décision en ce qui concerne la question de savoir s'il est compétent en vertu du paragraphe 24 (1) de la *Charte*.

## DECISION OF THE TRIBUNAL, JULY 8, 1991

1. This decision deals with the Tribunal's jurisdiction to apply the *Canadian Charter of Rights and Freedoms* ("the Charter"), Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11 to the *Pay Equity Act, 1987* ("the Act"). We conclude that section 30 of the Act and section 52 of the *Constitution Act, 1982* permit and oblige us to apply the Charter when it is raised in a matter before us. We reserve on our jurisdiction under section 24 of the Charter.

2. The Ontario Nurses' Association ("ONA") and The Women's Christian Association of London, Operator of the Parkwood Hospital ("Parkwood") are required by section 14 of the Act to negotiate and endeavour to agree on a pay equity plan for the employees of Parkwood represented by ONA. Parkwood was to have posted the plan by January 1, 1990. ONA and Parkwood did agree on a gender neutral comparison system, but could not agree on certain other matters. Parkwood applied to the Pay Equity Commission. The Review Officer appointed issued an order based on section 6 of the Act in respect to which ONA has requested a hearing before the Tribunal under subsection 24(6) of the Act.

3. This case specifically involves whether section 6 of the Act contravenes the Charter. The relevant portions of section 6 read as follows:

> s.6 (1) For the purposes of this Act, pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value.
>
> (2) Where there is no male job class with which to make a comparison for the purposes of subsection (1), pay equity is achieved when the job rate for the female job class

that is the subject of the comparison is at least equal to the job rate of a male job class in the same establishment that at the time of comparison had a higher job rate but performs work of lower value than the female job class.

(3) If more than one comparison is possible between a female job class in an establishment and male job classes in the same establishment, pay equity is achieved when the job rate for the female job class is at least as great as the job rate for the male job class,

(a) with the lowest job rate if the work performed in both job classes is of equal or comparable value; or

(b) with the highest job rate, if the work performed in the male job class is of less value.

4. The Review Officer found that there was one female job class, that of Registered Nurse. She applied subsection 6(1) of the Act and ended her search for a comparator when she found a male job class which was of "equal or comparable value" to the Registered Nurse, that is, the Manager of Physical Operations (McCormick House): it was scored at 36 points higher than the Registered Nurse.

5. ONA says that the search for a comparator should not end when a male job class of equal or comparable value is found if there are male job classes which perform work of lower value than the female job class at issue but which are paid a higher rate. In this case, ONA says, there is more than one comparator available and subsection 6(3) should be applied to allow the selection of the most advantageous comparator. If section 6 does not permit that approach, it is contrary to the Charter, in ONA's view. Parkwood argues that we do not have jurisdiction to hear ONA's Charter challenge, but that in any case, section 6 does not contravene the Charter.

6. Parkwood and ONA addressed our jurisdiction under subsection 24(1) of the Charter and under subsection 52(1) of the *Constitution Act, 1982*:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

7. Counsel for both Parkwood and ONA argued the issue on the basis of, among other cases, the Ontario Court of Appeal's decision in *Cuddy Chicks*, the Federal Court of Appeal's decision in *Tetreault-Gadoury*, and the Supreme Court of Canada's decision in *Douglas College* (*Cuddy Chicks Limited* v. *Ontario Labour Relations Board et al* (1989) 70 O.R. (2d) 179 (C.A.); *Re Tetreault-Gadoury and The Employment and Immigration Commission of Canada* (1988), 53 D.L.R. (4th) 384 (F.C.A.); and *Douglas/Kwantlen Faculty Association* v. *Douglas College*, [1990] 3 S.C.R. 570). Since then, however, the Supreme Court of Canada has released its decisions in *Cuddy Chicks* and in *Tetreault-Gadoury* (*Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)* (June 6, 1991, S.C.C.); *Tetreault-Gadoury* v. *Canada (Canada Employment and Immigration Commission)* (June 6, 1991, S.C.C.)). The Supreme Court's decision in *Cuddy Chicks* is most applicable to the circumstances of the Tribunal.

8. In *Cuddy Chicks*, paragraph 2(b) of the *Labour Relations Act*, R.S.O. 1980, c.228, which exempts agricultural workers from coverage by that Act, was the subject of a challenge under the Charter. A union applied for certification to represent a group of workers; the employer argued that the workers were

agricultural and that paragraph 2(b) constituted a bar to certification. The union claimed that paragraph 2(b) contravened the Charter. The Court of Appeal held that the Labour Relations Board had jurisdiction to hear the Charter challenge under section 52 of the *Constitution Act, 1982*, but not under section 24 of the Charter. Counsel for Parkwood conceded during the hearing that under the Court of Appeal's decision in *Cuddy Chicks*, the Tribunal had jurisdiction to apply the Charter by virtue of section 52.

9. In its decision in *Cuddy Chicks*, the Supreme Court held that the Labour Relations Board's jurisdiction to apply the Charter arises from two sources: its powers as defined by its enabling statute, the *Labour Relations Act*; and subsection 52(1) of the *Constitution Act, 1982*. Section 106 of the *Labour Relations Act* allows the Labour Relations Board to decide "all questions of law" in matters properly before it. Subsection 52(1) of the *Constitution Act, 1982* requires the Board to ensure, in applying the law, that that law is constitutionally valid, including whether it complies with the Charter. It was not necessary to decide whether the Labour Relations Board had jurisdiction under subsection 24(1) of the Charter.

10. In confirming its earlier analysis in *Douglas College*, the Supreme Court said in *Cuddy Chicks* that

> s.52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues . . . Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise.

Furthermore, to apply the Charter, "a tribunal . . . must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought". This scheme "mirrors the requirements for a court of competent jurisdiction under s.24(1) of the Charter as outlined in *Mills* v. *The Queen*, [[1986] 1 S.C.R. 863]".

11. The Court also confirmed two restrictions on the power of tribunals to apply the Charter. The first restriction is that the effect of section 52 is restricted to the case before the board or tribunal, since administrative tribunals do not have the power to grant a formal declaration of invalidity. A declaration of invalidity means that the offending provision has no further effect at all, while the tribunal's finding of "no force or effect" can affect only the parties involved in the particular case. The second limitation is that the tribunal's decision in Charter cases is not subject to curial deference.

12. The requirements established by the Supreme Court were met by the Labour Relations Board in *Cuddy Chicks*; they are also met by the Tribunal in the circumstances of this case. As does the Labour Relations Board under section 106 of the *Labour Relations Act*, the Pay Equity Hearings Tribunal "has exclusive jurisdiction to exercise the powers conferred upon it by or under [the *Pay Equity Act, 1987*] and to determine all questions of fact or law that arise in any matter before it" under section 30 of the *Pay Equity Act, 1987*. Thus the Tribunal's enabling statute expressly confers on the Tribunal "the power to interpret law [which] holds a concomitant power to determine whether that law is constitutionally valid" (*Cuddy Chicks*, S.C.C.).

13. With respect to "jurisdiction over the whole of the matter before it", the Supreme Court said the following about the Labour Relations Board's jurisdiction on the facts in *Cuddy Chicks*:

> It is clear that [the Labour Relations Board] has jurisdiction over the employer and the union. The issue here centres on its jurisdiction over the subject matter and remedy. The subject matter before the Board cannot be characterized simply as an application for certification, which would certainly fall within the authority of the Board. This is an application which requires the Board to subject s.2(b) of the Act to Charter scrutiny in

> order to determine whether the application for certification is properly before it. Similarly, the remedy of certification requires the Board to refuse to give effect to s.2(b) of the Act because of inconsistency with the Charter. Since the subject matter and remedy in this case are premised on the application of the Charter, the authority to apply the Charter must be found in the Board's enabling statute.

14. In the case before us, the Tribunal has jurisdiction over the persons: the employer, Parkwood, and the bargaining agent, ONA. The subject matter is the appropriate male comparator; the Tribunal must "subject [section 6 of the *Pay Equity Act, 1987*] to Charter scrutiny in order to determine whether the application [about the appropriate male comparator] is properly before it". We thus have jurisdiction over the subject matter. Should we find that section 6 contravenes the Charter, the effect of section 52 would be that the offending portions of section 6 would be of "no force or effect" *in this particular case*. To the extent that the remedy is to refuse to give effect to section 6 or portions of it, therefore, we have jurisdiction over the remedy.

15. Having regard to the Supreme Court's decision in *Cuddy Chicks*, as well as its decisions in *Tetreault-Gadoury* and *Douglas College*, therefore, we are satisfied that section 30 of our own enabling statute and section 52 of the *Constitution Act, 1982* grant us the jurisdiction and impose on us the duty to hear ONA's challenge to section 6 of the Act.

16. There may be one important difference between any of those cases and the case before us, however. None of those cases involved a remedy other than that flowing from the operation of section 52 of the *Constitution Act, 1982*. Here, ONA has asked that we "amend" section 6 to make it comply with the Charter. Both Parkwood and ONA agreed that we could not amend section 6 unless we had jurisdiction under subsection 24(1) of the Charter. ONA says we do have that jurisdiction; Parkwood says we do not. It is not clear to us that the appropriate remedy would be to "amend" section 6, nor that we have the power to amend legislation. In any event, these are not questions we need to or can decide at this stage of the proceedings; rather, they can and should wait until we have heard evidence and submissions on the application of the Charter to section 6 of the Act in the context of the circumstances of this case.

17. We therefore reserve our decision on whether the Tribunal also has jurisdiction under subsection 24(1) of the Charter. There is another reason why we must reserve on that question, arising out of the Supreme Court's brief consideration of subsection 24(1) of the Charter in *Cuddy Chicks*. The Court held that the criteria in *Mills* are applicable under section 52, and that these criteria were satisfied in *Cuddy Chicks*; it nevertheless declined to decide whether the Labour Relations Board is a "court of competent jurisdiction". Thus the question of whether a tribunal is a "court" has become of greater interest. The Court said on this point:

> An administrative tribunal need not meet the definition of a court of competent jurisdiction in s.24(1) of the Charter in order to have the necessary authority to subject its enabling statute to Charter scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the Charter.

18. The question of whether a tribunal is a "court" was not directly considered in the cases at the lower levels and was not addressed by the parties in this case. The participants in this case are therefore invited to make submissions on the question of whether the Tribunal is a "court" for the purposes of subsection 24(1) of the Charter. These submissions may be made during final argument on the Charter issues; of course, any

evidence on this point should be called prior to final argument. We also remind the participants that the Tribunal must have sufficient evidence of the circumstances *in this case* before we can reach a conclusion about the Charter's applicability to section 6 of the Act in the matter before us.

19. ONA, Parkwood and the Attorney General of Ontario, who has intervened in these proceedings, are to be prepared to lead evidence, if they intend to do so, and make submissions on all aspects of how the Charter applies to section 6 of the Act on the next scheduled day(s) of hearing.

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**0157-90 0212-91** Ontario Nurses' Association, Applicant v. St. Michael's Hospital, Respondent; St. Michael's Hospital, Applicant v. Ontario Nurses' Association, Respondent

**Before:** Mary Ellen Cummings, Vice-Chair and Members, Donald Dudar and Geri Sheedy

**Appearances:** Laura Trachuk, Cindy Wilkey and Maureen O'Halloran for the Ontario Nurses' Association; Peter Chauvin, Andrew Roman and Michael Moga for St. Michael's Hospital; Mary Eberts and Linda Telgarsky for Hay Management Consultants Limited

**Cite As: St. Michael's Hospital (No. 1) (1991), 2 P.E.R. 183**

**Practice and Procedure - Intervention**

The Ontario Nurses' Association ("ONA") alleged that the comparison system St. Michael's Hospital ("the Employer") proposed to use would be gender-biased when applied to the nurses in the bargaining unit represented by ONA. Hay Management Consultants Ltd. ("Hay"), the marketer of the system the Employer proposed to use, sought to intervene in the proceedings as a party, grounding its entitlement to do so on its commercial interest in the outcome of the proceedings.

The Tribunal dismissed Hay's application to intervene as a party.

Hay is not entitled to be a party under section 32(1) of the *Act*. Assuming that persons other than those enumerated in s. 32(1) may be parties pursuant to s. 5 of the *Statutory Powers Procedure Act* where they are "entitled by law", it is necessary to consider whether Hay is entitled by law to that status. Hay in its capacity as marketer of the job evaluation system has no obligations under the *Act*. The Tribunal's focus in the case is not the gender neutrality of the Hay system in general, but the gender neutrality of the Employer's proposals. Not only has Hay no obligations under the *Act* such that the Tribunal could order a remedy against it, but it also has no cause of action maintainable against ONA at the Tribunal.

**Pratique et procédure - Intervention**

La «Ontario Nurses' Association» («ONA») prétendait que le système de comparaison que l'hôpital St. Michael («l'employeur») se proposait d'utiliser serait sexiste lorsqu'on l'appliquerait aux membres de l'unité de négociation que l'ONA représentait. La firme Hay Management Consultants Ltd. («Hay»), qui a commercialisé le système que l'employeur se proposait d'utiliser, voulait intervenir en tant que partie à l'instance, en faisant valoir que son intérêt commercial était lié à l'issue de l'instance.

Le Tribunal a rejeté la requête en intervention de Hay.

Hay n'a pas le droit de constituer une partie à l'instance en vertu du paragraphe 32 (1) de la *Loi*. Si l'on suppose que d'autres personnes que celles qui sont énumérées au paragraphe 32 (1) peuvent être des parties conformément à l'article 5 de la *Loi sur l'exercice des compétences légales* si la loi leur confère ce droit, il importe d'examiner si Hay a effectivement droit à ce statut en vertu de la loi. La *Loi* ne confère aucune obligation à Hay en sa qualité de commercialisateur du système d'évaluation d'emplois. Dans la présente affaire, le Tribunal n'étudie pas le caractère non sexiste de l'ensemble du système de Hay, mais plutôt le caractère non sexiste des propositions de l'employeur. En plus de n'avoir aucune obligation en vertu de la *Loi* à l'encontre de laquelle le Tribunal pourrait ordonner un recours, Hay ne possède aucune cause d'action qu'il peut intenter à l'encontre de l'ONA devant le Tribunal.

**DECISION OF THE TRIBUNAL, AUGUST 19, 1991**

1. Hay Management Consultants Limited ("Hay") has sought to be added as a party in these proceedings between the Ontario Nurses' Association ("ONA") and St. Michael's Hospital (the "Hospital"). ONA alleges that the Hospital has breached sections 4(1) and (2), 5(1), 6(1) and (5), 7(1) and (2), 12 and 14(1) and (2) of the *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended, (the "*Act*") in proposing a comparison system that would be gender-biased when applied to the nurses in the bargaining unit represented by ONA. Hay alleges that, as the marketer of the comparison system the Hospital proposed, it possesses a commercial interest in the outcome of these proceedings which entitles it to be added as a party.

2. We wish to make it clear that our consideration of Hay's application is only in the context of its request to be a party intervenor. Hay is not seeking status as a non-party intervenor or "friend of the court", as this type of intervenor is sometimes called. Although decisions of the courts have sometimes confused these two types of intervenor, their roots in the law arise out of different purposes and their rights and obligations, once allowed to participate in the proceedings, are quite different.

3. Party intervenors have been allowed to participate in proceedings in order to protect a general or particular interest. They are allowed to join the action in the interests of efficiency; a multiplicity of proceedings is avoided because in return for the right to participate as a party, the intervenor is bound to results of the decision.

4. Non-party intervenors, on the other hand are allowed to participate in the proceedings not because they necessarily have an interest, but because they have a point of view that the decision-maker believes will be informative. Unlike a party intervenor, they do not automatically have full rights to participate, that is, to call evidence, cross-examine witnesses, and make full argument. They are not bound by the decision and have no right to appeal an adverse decision. The extent of their participation must be determined by the decision-maker (for a discussion of non-party intervenors before the Tribunal see *Wentworth County Board of Education* (1990), 1 P.E.R. 132).

5. Against that backdrop, we considered the application in this case.

6. Hay argued that our jurisdiction to add parties can be found in subsections 29(2)(b) of the *Act*, and section 5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484 (the "*S.P.P.A.*"). ONA argued that the parties to the proceedings are set out in subsection 32(1) of the *Act* and that the Tribunal cannot add to them.

7. Subsection 32(1) of the *Act* and section 5 of the *S.P.P.A.* state:

> 32(1) Where a hearing is held before the Hearings Tribunal or where a review officer investigates for the purposes of effecting a settlement of an objection or complaint, the parties to the proceeding are,
>
> (a) the employer;
>
> (b) the objector or complainant; and
>
> (c) the bargaining agent (if the pay equity plan relates to a bargaining unit) or the employees to whom the plan relates (if the plan does not relate to a bargaining unit).
>
> 5 The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

8. We agree with the reasoning of the Tribunal in *Women's College Hospital (No. 1)* (1989), 1 P.E.R. 53 which held that the power to control our procedures in subsection 29(2)(b) does not override the subsection 32(1) declaration of the parties to the proceedings. It is common ground that Hay, in its capacity as a marketer of job comparison systems, is not one of the enumerated parties in subsection 32(1). Therefore, any jurisdiction to add Hay as a party must be found in section 5 of the *S.P.P.A.*.

9. At issue is whether subsection 32(1) provides an exhaustive list of the parties to proceedings before the Tribunal or, whether by virtue of section 5 of the *S.P.P.A.*, persons who are entitled by law to be parties

can be added (for a full analysis of the case law see *Women's College Hospital (No. 1)* and *Wentworth County Board of Education*).

10. For the purposes of reaching a decision in this case, it is not necessary to resolve that issue. Without deciding whether section 5 of the *S.P.P.A.* permits the Tribunal to add other parties, we determined whether Hay met the test of a party "entitled by law to be a party to the proceedings". We used the tests set out by the Tribunal in *Women's College Hospital (No.1)* at paragraph 72.

**What is the nature of proceedings before the Tribunal? What are the issues in this particular case?**

11. Hay argued that the allegations contained in ONA's Application constitute a full scale attack on the job comparison system marketed by Hay. Not only are the allegations levelled at the application of this system in this workplace, it was argued, they are made against Hay's generic system. Hay said that ONA's pleadings allege that the Hay system is so fundamentally flawed that it cannot be used by the Hospital as a basis for negotiations about a gender-neutral comparison system. Hay argued that since ONA will not consider Hay as a basis for negotiation, we can only conclude that the generic Hay system is in dispute in these proceedings. Therefore, it is argued, Hay faces the risk of a finding by the Tribunal that places its ability to do business at risk.

12. We have difficulty seeing that potential consequence. As the Tribunal said in *Women's College Hospital (No.1)*, at paragraph 77, the nature of proceedings before the Tribunal is disputes between parties who have rights and obligations under the *Act*:

> A review of the *Pay Equity Act, 1987* reveals that the disputes which the Tribunal will be considering are more in the nature of *lis inter partes*. The statute requires that the Tribunal adjudicate upon matters arising from the preparation and negotiation of a pay equity plan. It also requires, in certain cases, that we determine whether the *Act* has been breached by one of the parties identified in the *Act* as a participant in the pay equity process. Furthermore, the remedies provided under section 25(2) are such that they involve a resolution of particular disputes between particular parties.

13. Hay, in its capacity as a marketer of job comparison systems does not have obligations under the *Act*. In a case such as this, the focus is not the gender neutrality of the "Hay system" in general, but the gender neutrality of the proposals put forward by the Hospital, in the context of the female job classes to be reviewed in this bargaining unit and their potential male job class comparators.

14. We see that the Tribunal has followed that approach in the first decision released on the issue of the gender-neutrality of a comparison system, *Haldimand-Norfolk* 0001-89 (29 May 1991) P.E.H.T.[now reported at 2 P.E.R. 105]. The findings made by the Tribunal are grounded in its assessment of the ability of the the proposed comparison system to collect information about the female job classes in issue; to provide a mechanism to determine how value will be attached to that information; and to apply that mechanism in a gender-neutral way. The emphasis of the Tribunal was very much on the gender-neutrality of the proposed comparison system in that workplace. In this case, the emphasis will be the same.

15. In an oral ruling, we identified the issues in this case as follows:

> The Ontario Nurses' Association alleges that the Respondent's proposed job comparison system is inappropriate for this workplace. Although the Respondent has alleged that its proposed comparison system is flexible and can be modified through negotiations to meet

> the needs of this workplace, ONA alleges that it cannot be modified sufficiently to produce gender-neutral results when applied to nurses in this workplace.

16. ONA alleges that it can establish that the comparison system proposed by the Hospital is so fundamentally flawed that it cannot be successfully modified and therefore, cannot be used as a basis for negotiations in this workplace. Whether ONA can make that case out is an issue of proof, but it does not change the nature of the dispute before the Tribunal.

17. We recognise that we may have to resolve some complex questions of what evidence is relevant to the matters in dispute, but again, that does not change the nature of the dispute. Our ruling identifying the issues will assist us in resolving the evidentiary questions.

**What is the nature and scope of the proposed intervenor's concern in these proceedings?**

18. Hay alleges that it has a commercial interest in the outcome of these proceedings. If ONA succeeds in its Application, Hay says that it will suffer damage both with respect to its ability to contract with this Hospital and with other employers in the Province.

19. We were provided with case law that held that a commercial interest was sufficient to justify intervention. In other proceedings, that may well be the case. In other proceedings, there may be general classes of persons over whom the court or tribunal has jurisdiction. But under the *Act*, there are very specific entities over whom the Tribunal has the power to award remedies. That group does not include marketers of job comparison plans. We do not believe that we have the jurisdiction to order remedies either for or against Hay, in its capacity as a marketer of job comparison systems.

20. Hay relied on *Fishing Vessel Owners' Association of British Columbia et al. v. Canada* (1985), 57 N.R. 375 (Fed. C.A.). However, a careful reading of the case indicates that the Court rejected the applicant's right to be a party to the proceedings; instead it was given non-party intervenor status. The Court stated, at paragraph 13:

> The test to be applied to enable a person to be joined as a party is that the action or at least part of the action must be maintainable as between the applicant and the party against whom the former is seeking to be joined.

21. We apply the same test in this case. Even if Hay has a concern in the outcome of these proceedings, it does not have an action maintainable against ONA at the Tribunal. Therefore, there is no multiplicity of action to avoid. Hay does not have a sufficient concern in these proceedings to be added as a party intervenor.

22. It is possible for Hay to appear as a witness for the Hospital. Hay argued that this was not an acceptable alternative because in the role of witness, it would have little or no control over the shape of the litigation, that is, what evidence would be led and how. Hay also argued that it may well find itself in a conflict with the Hospital: Hay would want to approach the case one way, while the Hospital would want to follow another course. Hay argued that it must be able to defend its interests directly, not through the Hospital.

23. In answer to those concerns, we go back to the nature of the proceedings before the Tribunal, the issues in these proceedings, and Hay's interest in them. These proceedings are between ONA and the

Hospital because they are the parties with rights and obligations under the *Act*. It is for those parties to shape the litigation and determine what evidence will be called. While Hay may have some interest in these proceedings, it has no rights and obligations under the *Act*.

24. Since we have concluded that Hay does not have a sufficient interest to be a party entitled by law to participate in the proceedings, within the meaning of section 5 of the *S.P.P.A.*, it is not necessary for us to consider whether its participation would prejudice the other parties.

25. The application to intervene is therefore denied.

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**0157-90 0212-91**Ontario Nurses' Association, Applicant and St. Michael's Hospital, Respondent; St. Michael's Hospital, Applicant and Ontario Nurses' Association, Respondent

**Before:** Mary Ellen Cummings, Vice-Chair and Members, Donald Dudar and Geri Sheedy

**Appearances:** Laura Trachuk, Cindy Wilkey and Maureen O'Halloran for the Ontario Nurses' Association; Peter Chauvin, Andrew Roman and Michael Moga for St. Michael's Hospital

**Cite as:** St. Michael's Hospital (No. 2) (1991), 2 P.E.R. 187

**PEHT - Hearing - Jurisdiction**

At the time the application for hearing was made to the Tribunal, no settlement had been reached and the review officer had not yet made an order or referred the matter to the Tribunal. The preliminary issue was whether the Tribunal had the jurisdiction to hear and determine the case.

The Tribunal held that the application was premature and that it therefore did not have jurisdiction to hear it.

The parties could not agree on the choice of a gender-neutral comparison system and applied to review services for assistance. Subsequently, they also applied to the Tribunal. The Tribunal is required by s.25(1)(a) to hold a hearing where a review officer has been unable to effect a settlement and has not made an order under s.24(3). In this case, the officer did not make an order and the question was whether the officer had been "unable to effect a settlement". St. Michael's Hospital ("the Employer") argued that in the absence of a notification from the officer under s.24(3) stating that she had been unable to effect a settlement the Tribunal could not conclude that this was the case. The Tribunal held that the determination of whether the officer has been unable to effect a settlement is one for the Tribunal to make. If the officer has notified the Tribunal that she has been unable to effect a settlement, that notification would almost certainly lead the Tribunal to conclude that she had been unable to settle the matter and that it had jurisdiction to hear it. Since there could be many reasons for not issuing a notification, however, the absence of one would not necessarily lead the Tribunal to conclude that a settlement could still be effected, although it was a factor that would be taken into account. Having regard to the absence of notification under s. 24(3); the length of time the parties spent bargaining, both before and after the application to Review Services; the complexity of the issues being bargained; and the number of meetings held, the Tribunal found that the application was premature.

**T.É.S. - Audience - Compétence**

Au moment où la requête pour obtenir une audience a été déposée auprès du Tribunal, aucun règlement n'était intervenu et l'agente de révision n'avait pas encore donné d'ordre ni saisi le Tribunal de la question. La question préliminaire consistait à déterminer si le Tribunal avait compétence pour trancher la question.

Le Tribunal a statué que la requête était prématurée et décidé, par conséquent, qu'il n'avait pas compétence pour l'entendre.

Les parties ne pouvaient pas s'entendre sur le choix d'un système non sexiste de comparaison et ont demandé l'aide des Services de révision. Plus tard, elles ont également présenté une requête au Tribunal. Celui-ci est tenu, en vertu de l'alinéa 25 (1) a), de tenir une audience si un agent de révision n'a pu amener les parties à accepter un règlement et n'a pas donné d'ordre en vertu du paragraphe 24 (3). Dans la présente affaire, l'agente n'avait pas donné d'ordre et la question était de savoir si elle «n'avait pu amener les parties à accepter un règlement». L'hôpital St. Michael («l'employeur») soutenait qu'en l'absence d'un avis de l'agente donné en vertu du paragraphe 24 (3) et précisant qu'elle n'avait pu amener les parties à accepter un règlement, le Tribunal ne pouvait pas conclure que cela était le cas. Le Tribunal a statué qu'il lui revient de décider si un agent ou une agente a été incapable d'amener les parties à accepter un règlement. Si l'agente avait avisé le Tribunal qu'elle ne pouvait pas amener les parties à accepter un règlement, cela aurait probablement amené le Tribunal à conclure qu'elle n'avait pu régler le litige et qu'il avait compétence pour l'entendre. Cependant, étant donné qu'il peut y avoir de nombreuses raisons pour lesquelles un avis n'est pas donné, l'inexistence d'un avis ne signifie pas nécessairement, pour le Tribunal, qu'un règlement peut encore intervenir même s'il s'agit, toutefois, d'un facteur qui entrera en ligne de compte. Compte tenu du défaut de donner un avis en vertu du paragraphe 24 (3), de la durée des négociations entre les parties, avant et après le dépôt de la requête aux Services de révision, de la complexité des questions faisant l'objet des négociations, et du nombre de réunions organisées, le Tribunal a statué que la requête était prématurée.

**DECISION OF THE TRIBUNAL, AUGUST 20, 1991**

1. The Ontario Nurses' Association ("ONA") made an Application to the Tribunal on December 21, 1989 alleging that St. Michael's Hospital ( the "Hospital") has breached sections 4(1) and (2), 5(1), 6(1) and (5), 7(1) and (2), 12 and 14(1) and (2) of the *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended, (the "*Act*") in proposing a comparison system that would be gender-biased when applied to the nurses in the bargaining unit represented by ONA. At the outset of the hearing, the Hospital moved to strike the Application. A number of grounds were argued, but it is only necessary to deal with some of them in reaching our decision.

**Facts**

2. The parties commenced bargaining towards a pay equity plan in January of 1989. The Hospital initially proposed that the parties agree to use a comparison system designed by Hay Management Consultants Limited ("Hay"). On February 2, 1989, ONA wrote to the Hospital indicating that it was recommending that a policy capturing approach be used and that one was available through the Women's Directorate, New York State University. Throughout the proceedings, this plan was referred to as the SUNY policy capturing plan. In the same letter, ONA said that it did not

> believe that an 'off the shelf' plan is appropriate and we believe that [it] would be more appropriate to have a job evaluation system designed for the health care industry from the beginning instead of recycling an already existing plan such as the Hay system.

3. Bargaining continued. A presentation was made by Hay to both parties, but ONA continued to have concerns about the proposed comparison system. Those concerns were that the system had been created in the 1940's and 1950's, at a time when issues of gender bias were not considered; the system placed too much emphasis on managerial aspects of jobs; and the system could not be successfully modified to meet the requirements of the *Act*.

4. In April of 1989, the Hospital agreed to look at the SUNY policy capturing approach and arranged for a proposal and presentation to be made. The Hospital was concerned that it did not really understand the approach; also the system's statistically based approach and the use of closed ended questions left little room for communication between the parties during the process. To gain a better understanding, representatives of the Hospital visited representatives of the Manitoba Health Organisation, who had worked with the SUNY system. After those meetings, the Hospital raised with ONA its concerns that the SUNY policy capturing system was difficult to understand and would make it difficult for the parties to resolve any disputes that might arise.

5. ONA then proposed that the parties consider a SUNY *a priori* system. The Hospital arranged for another proposal from SUNY on their *a priori* system. A proposal was received and shared with ONA in November, 1989. The Hospital expressed concerns about the lack of experience of the consultants who were suggested and the short timeframe that was proposed by SUNY for completion of the process. The Hospital suggested that the parties test the Hay system on a without prejudice basis, with the assistance of a consultant from SUNY so that the Hospital could better understand ONA's concerns about the alleged gender bias of the proposed system and so that ONA would have a better understanding of Hay. ONA rejected that proposal.

6. There is some dispute whether the Hospital also proposed a without prejudice testing of the SUNY policy capturing system in tandem with the Hay system. ONA denies that such a proposal was made. For the purposes of this decision, it is not necessary to resolve that dispute.

7. In November 1989, the parties recognised that they needed assistance and it was agreed that ONA would apply for Review Services. That was done on November 29, 1989. The only issue in dispute was the selection of the gender-neutral comparison system.

8. The Review Officer convened two meetings, in January and March 1990. We heard no evidence of what went on at those meetings. We did receive a copy of a letter written by the Review Officer on April 17, 1990, enclosing information that she had collected relating to the modification of Hay in another health care setting. She indicated that she would contact the parties in June to arrange another meeting "to discuss whether or not mutual agreement on a joint evaluation/modification process is a viable alternative".

9. On August 22, 1990, ONA wrote to the Review Officer stating that on its review of the materials provided "the Union does not believe that the Hay system can be modified in order to provide the basis for developing an acceptable gender neutral comparison system for our members at St. Michael's Hospital". The letter also states that ONA's job evaluation experts were in agreement and that their view was supported by expert literature. The letter closed by saying that in light of its views on the Hay system a further meeting with Review Services was unnecessary.

10. Neither the Hospital nor the Review Officer responded to this letter. The Review Officer did not make an Order, nor did she make a referral under subsection 24(5). Therefore, it is agreed that our jurisdiction to hear this matter must be found in subsection 25(1)(a), which reads:

> 25(1) The Hearings Tribunal shall hold a hearing,
>
> (a) if a review officer is unable to effect a settlement of a complaint and has not made an order under subsection 24(3).

**Submissions of the Parties**

11. The Hospital argued that the Tribunal has no jurisdiction to hear this matter because the statutory preconditions for a hearing have not been met. The Hospital argued that in order for us to find that the Review Officer has been unable to effect a settlement, there would have to be a notice under subsection 23(2):

> The review officer shall notify the parties and the Hearings Tribunal as soon as he or she decides that a settlement cannot be effected and that he or she will not be making an order under subsection 24(3).

12. It is common ground that no such notice was received by the parties or the Tribunal.

13. The Hospital argued that notice under subsection 23(2) is a statutory precondition to the Tribunal taking jurisdiction under subsection 25(1)(a); the Tribunal cannot hold a hearing absent such a notice. The Hospital acknowledged that such notice was not essential in all cases, but that the exceptions were limited. Counsel said that we could take jurisdiction in the event of death or incapacity of a Review Officer or where the Review Officer improperly refused to give such a notice when it was requested.

14. ONA argued that notice under subsection 23(2) was not a precondition to the Tribunal's jurisdiction under subsection 25(1) and relied on the Tribunal's decision in *Haldimand-Norfolk (No.1)* (1989), 1 P.E.R. 1 at paragraph 30, in which the Tribunal said:

> The language of subsection 25(1)(a) is clear and unambiguous. The Tribunal is required to hold a hearing if a review officer is unable to effect a settlement of a complaint and has not made an order under subsection 24(3). Where the legislation required preconditions to the holding of a hearing, they are expressly stated in Section 25. An example of this is subsection 25(1)(c) which is dependent upon the review officer making a referral. No such prerequisite for the review officer to make a decision, notification or referral exists in subsection 25(1)(a) and it would be inappropriate to read such a requirement into the subsection. Instead we must look to the wording of the section and to the preconditions that are specified, namely that the review officer is unable to effect a settlement of a complaint and has not made an order under subsection 24(3).

15. The decision went on to indicate in paragraph 34 that it is for the Tribunal to determine if the Review Officer has been unable to effect a settlement. In making that determination, the Tribunal asks whether there has been a reasonable opportunity for a settlement to be effected. If the answer is yes, the Tribunal will proceed with a hearing; if the answer is no, then the parties need to continue the Review Services process.

16. At paragraph 37, the Tribunal said:

> In assessing what is a reasonable opportunity, several factors must be considered. The factors, although not an exhaustive list, include: the nature and extent of pay equity bargaining prior to the application to review services; the length of time the parties were at review services; the nature and complexity of the issues in dispute; the willingness of both parties to continue discussions where a settlement seems possible; and the time remaining until the mandatory time frames required by the *Act*.

17. ONA urged us to follow that decision both on the question of our jurisdiction to hear a matter under section 25(1)(a) and on the factors to be considered in determining if the Review Officer has been unable to effect a settlement. ONA argued that the parties had bargained for 12 months, with 8 meetings, before applying to Review Services; were at Review Services for 8 months with 2 meetings and then waited a further 4 months from their letter to the Review Officer saying a further meeting was unnecessary, before applying to the Tribunal. ONA further argued that the issue of gender neutrality was extremely complex, that further negotiations would be fruitless and that ONA should not have to wait indefinitely to get needed direction from the Tribunal.

18. The Hospital argued that ONA cannot use an intransigent position on the Hay system to justify a short circuiting of the Review Services process. The Hospital believes that the parties are not at an impasse, because the Hospital has shown that it is open to ONA's proposals on the choice of a gender-neutral comparison system. The Hospital believes that further negotiations would be useful and asks us to find that there has not been a reasonable opportunity for a Review Officer to effect a settlement.

19. The Hospital also argued that prior to receiving ONA's Application to the Tribunal, it had not received the particulars of ONA's concerns about the Hay system. The Hospital argued that it should have had an opportunity to review and address those concerns at the bargaining table first. ONA argued that its Application merely particularised the concerns it had raised with the Hospital during bargaining, and that the Application to the Tribunal contained no new information.

**Decision**

20. It is agreed that our jurisdiction to hear this matter must be found in subsection 25(1)(a) of the *Act*. We must find that the Review Officer was unable to effect a settlement before the matter can proceed to a hearing. We agree with the analysis of the Tribunal in *Haldimand–Norfolk (No.1)* which held that it is for the Tribunal, rather than the Review Officer, to determine that question.

21. As the Tribunal said in *Haldimand–Norfolk (No.1)*, we must review the evidence and decide if there was a reasonable opportunity for the parties to settle during the Review Services process. This requires the Tribunal to examine what happened at Review Services. But the Tribunal must do so without damaging the effectiveness of the Review Services process. The Review Officer would be knowledgeable about whether there had been a reasonable opportunity for settlement and his or her opinion would be helpful.

22. The *Act*, through subsection 23(2), provides a mechanism for the parties and the Tribunal to receive the Review Officer's opinion without impairing the Review Services process. A notice from a Review Officer under subsection 23(2) would provide us with a clear statement of the Officer's view of the possibility of settlement. If such a notice existed the Tribunal would almost certainly conclude that the Review Officer had been unable to effect a settlement, and that the Tribunal had jurisdiction to hear the matter.

23. Where there is no notice under subsection 23(2) the Tribunal can draw the inference that the Review Officer had not concluded that a settlement could not be effected. However, since there may be other reasons why no notice was issued, the absence of notice is not as conclusive.

24. In this case, we find that the absence of notice from the Review Officer under subsection 23(2) is significant, though not determinative. We also considered the factors set out by the Tribunal in paragraph 37 of *Haldimand–Norfolk (No.1)*, which we quoted earlier.

25. We note that bargaining occurred over a 12 month period. The main topic of those negotiations was the selection of a gender neutral comparison system. Without assessing the quality of that bargaining, we note that various proposals were put forward by both parties, and when they could not determine how to proceed further, they agreed to seek the assistance of a Review Officer.

26. Two meetings were held with the Review Officer and it appears from her letter of April 17, 1990 that she intended to schedule another. ONA's letter of August 27, 1990 indicated that a further meeting was unnecessary because it did not believe that the Hay system could be modified to make it gender neutral for the nurses in ONA's bargaining unit. It does not appear that the Review Officer then attempted to set up a further meeting.

27. Although the parties bargained for 12 months and were at Review Services for 8 months, little progress was made. While the parties clearly spent an extended period in bargaining and in discussing the matters with the Review Officer the issues were very complex, so we would expect both extensive bargaining and extensive time spent with a Review Officer. In some cases, 12 months of bargaining and 8 months at Review Services would lead the Tribunal to believe that there had been a reasonable opportunity for settlement. However, the mere passage of time is not the only factor.

28. We heard little evidence on the discussions at Review Services because the parties, rightly, acknowledged that such discussions generally occur on a without prejudice basis. However, the documents

that the parties agreed to put before us disclose that ONA's position both in bargaining and at Review Services was that it did not want to discuss the use of the Hay system since ONA believed that the Hay system could not be modified sufficiently to produce gender neutral results when applied to the members in its bargaining unit.

29. We note, however, that modification of a Hay comparison system was not the only potential outcome from the Review Services process. It appears that other comparison systems, including those proposed by ONA, were still possible, in that the Hospital was still prepared to consider them, although it had not agreed to use them. The Review Officer may have offered still further possibilities if the process had continued.

30. The Tribunal said, in *Family and Children's Services of Thunder Bay* (13 July 1990) 0091-90 (P.E.H.T.)[now reported at 2 P.E.R. 27] at paragraph 13:

> ...we cannot accept that parties should be able to circumvent the settlement process envisioned by the *Act* simply by asserting they would not settle: given the way in which matters proceeded, it is impossible to say what would have happened had the process continued with discussions

31. We are also concerned that prior to ONA's Application to the Tribunal, the Hospital was not fully informed of ONA's concerns with the Hay system. Essential to both informed bargaining and a reasonable opportunity for settlement at Review Services is that a party fully and frankly raise its concerns with the other party's position. We note that one of the facts the Tribunal took into account in *Haldimand-Norfolk (No.1)* in deciding that there had been a reasonable opportunity for settlement was that the Review Officer had the benefit of comprehensive documentation on the issues in dispute. In this case, it appears that ONA's detailed concerns were not set out until the Application to the Tribunal was filed. The allegations raised by ONA in its Application extend beyond the general concerns expressed to the Hospital in bargaining and include a detailed critique of the elements of the Hay system. We believe that these parties should have an opportunity to discuss these issues at Review Services before the matter proceeds to the Tribunal, if a settlement is not effected.

32. We are well aware that the mandatory posting date for these parties passed on January 1, 1990. There is a real need to get on with the process of implementing pay equity for the ONA members at the Hospital. However, we do not believe that proceeding to the Tribunal at this point is the most efficient way of meeting that goal.

33. The Tribunal must balance the need to ensure the efficacy of the Review Services process with the parties' right to have their matter determined by the Tribunal once that appears to be the most efficient alternative. In this case, we are not convinced that there was a reasonable opportunity for a settlement to be effected by the Review Officer. We believe that the parties would benefit from more negotiations, with the assistance of a Review Officer, to ensure that each side fully understands the position of the other and that all the possibilities for a mutually agreeable settlement are canvassed.

34. This Application is premature. We therefore find that we do not have jurisdiction to hear ONA's Application in Tribunal File No. 157-90 at this time.

35. We suggest that when the parties return to Review Services, they make use of the guidance provided by the Tribunal in *Haldimand-Norfolk* (29 May 1991) 0001-89 (P.E.H.T.)[now reported at 2 P.E.R. 105]. That decision may assist the parties in their assessment of each other's proposals. We suggest also that the parties note the Tribunal's reliance on evidence from the pilot testing of the proposed comparison system.

36. Our determination that this Application is premature is without prejudice to the bringing of another Application at a later date.

37. Given our determination and the Hospital's submissions, we adjourn *sine die* the Application in Tribunal File No. 0212-91.

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**0223-91 0225-91 0237-91** Gail R. Wells, Benita Larsen, Tanya Zablishinsky, Pamela Delaurier, and John Kucharczuk, Applicants v. Liquor Control Board of Ontario, Respondent; Liquor Control Board of Ontario, Applicant v. Gail R. Wells, Benita Larsen, Tanya Zablishinsky, Pamela Delaurier and John Kucharczuk, Respondents; Joyce McConnell, Applicant v. Liquor Control Board of Ontario, Respondent

**Before:** Patricia Hughes, Alternate Chair, and Members Geri Sheedy and Janet Slone Taylor

**Appearances:** Gail Chapman, Brian Beebe and Vincent P. Johnston for the Liquor Control Board of Ontario; Sheila Cuthbertson and Lily Harmer for Gail R. Wells, Benita Larsen, Tanya Zablishinsky, Pamela Delaurier and John Kucharczuk; Joyce McConnell on her own behalf.

**Cite As:** Liquor Control Board of Ontario (1991), 2 P.E.R 193

**PEHT - Hearing - Prima facie case**

**Practice and Procedure - Dismissal Without a Hearing**

A group of employees and one individual employee requested a hearing before the Tribunal with respect to a pay equity plan prepared by a review officer. The applications alleged essentially that the job class to which the employees belonged had been undervalued. The employer also requested a hearing. At the outset of the hearing the panel on its own motion questioned whether any of the applicants had demonstrated a *prima facie* case in their pleadings.

The Tribunal held that a *prima facie* case had been made out.

The Tribunal cited its earlier decision in *Peterborough* (1991), 2 P.E.R. 86, in which it held that a case will only be dismissed without a hearing on the merits where it is "plain and obvious" that such a hearing cannot lead to a result contemplated by the legislation. In this case, the Tribunal acknowledged that the pleadings were sparse, but found that they went beyond bald allegations and established a *prima facie* case. The Tribunal also found persuasive the argument that non-union applicants have little access to information about their employer's pay equity plan and that their pleadings would therefore likely require further particulars which could only be prepared if the Tribunal ordered disclosure by the employer. The parties were granted leave to provide such further particulars as were necessary and were requested to attend a second pre-hearing conference to address the need for further particulars and for disclosure.

**Alternate Chair Patricia Hughes Dissented:**

None of the applications establishes a *prima facie* case. Each requests that the plan be settled in a specific way, yet gives no information which, if true, would enable the Tribunal to do that. The Tribunal was neither established to listen to speculation nor as a way of applicants' obtaining information to decide whether they really have a case or not. An allegation must eventually be proved. The way in which the applicant intends to prove it is revealed by the "material facts" set out in the application. The material facts pleaded in the employee applications do not deal with whether or in what way the job class came to be undervalued, yet these are the questions that must be answered before the plan can be settled in their favour. Similarly, in the employer's application there are no facts pleaded about the way in which the evaluation of the job class in the amended plan is inappropriate.

**T.É.S. - Audience - Cause à première vue**

**Pratique et procédure - Rejet sans audience**

Un groupe d'employées et une autre employée, à titre individuel, ont demandé une audience devant le Tribunal en ce qui concerne le programme d'équité salariale préparé par un agent de révision. Elles prétendaient, dans leurs requêtes, que la catégorie d'emplois à laquelle elles appartenaient avait été sous-évaluée. L'employeur a également demandé de se faire entendre. Au tout début de l'audience, le comité a demandé, de son propre chef, si un des requérants avait établi une cause à première vue dans ses actes de procédure.

Le Tribunal a statué qu'une cause à première vue avait été établie.

Le Tribunal a cité sa décision antérieure dans *Peterborough* (1991), 2 P.E.R. 86, dans laquelle il a statué qu'une cause sera rejetée sans audience sur son bien-fondé seulement s'il est «clair et évident» qu'une audience ne peut pas donner un des résultats qu'envisage la loi. Dans la présente affaire, le Tribunal a reconnu que les faits précisés dans les actes de procédure étaient peu informatifs, mais il a conclu qu'ils n'étaient pas que de simples allégations et qu'ils établissaient une cause à première vue. Le Tribunal a également été convaincu par l'argument suivant : l'accès des requérants non syndiqués aux renseignements sur le programme d'équité salariale de leur employeur est très limité et, par conséquent, leurs actes de procédure nécessitent d'autres détails qu'ils ne peuvent obtenir que si le Tribunal ordonne à l'employeur de les divulguer.

**Les parties ont obtenu l'autorisation de fournir les détails supplémentaires jugés nécessaires et ont été invitées à assister à une deuxième conférence préparatoire à l'audience sur le besoin de fournir d'autres détails et de divulguer certains renseignements.**

**Dissentiment de Patricia Hughes, présidente suppléante**

**Aucune des requêtes n'établit une cause à première vue. Chacune demande que le programme soit réglé d'une façon particulière; pourtant, aucune ne comprend des renseignements qui, s'ils étaient véridiques, permettraient au Tribunal de ce faire. Le Tribunal n'a pas été créé pour entendre des conjectures ni pour permettre aux requérants d'obtenir des renseignements afin de décider si leur cause est fondée ou non. Toute allégation doit finalement être prouvée. Les «faits pertinents» énoncés dans la requête permettent au requérant de prouver ses allégations. Les faits pertinents qu'invoquent les employées ne traitent pas de la question de savoir si la catégorie d'emplois a été sous-évaluée, ni des raisons pour lesquelles elle a été sous-évaluée. Pourtant, il importe de répondre à ces questions avant de trancher le litige en faveur des employées. Quant à la requête de l'employeur, elle ne comporte aucun fait relatif au caractère inapproprié de l'évaluation de la catégorie d'emplois dans le programme modifié.**

## DECISION OF TRIBUNAL, OCTOBER 10, 1991

1. These three files concern objections to a review officer's Order. In file 0223-91, Gail R. Wells, Benita Larsen, Tanya Zablishinsky, Pamela Delaurier and John Kucharczuk (Gail R. Wells *et al*) applied for a hearing under section 16(4)3. They claimed that the Liquor Control Board of Ontario ("LCBO") had failed to establish compensation practices that provide for pay equity, by undervaluing their work, by adopting a gender-biased comparison system and by adopting a job comparison procedure which was flawed and inappropriate to establish a gender-neutral pay equity plan. They requested as a remedy that the Order of the review officer be varied so as to increase their grade level from a grade 9 to a higher level. In the alternative, they requested that the Tribunal set aside the Respondent's pay equity plan of June 1990 and the amended plan of April 1991, and order that the review officer, with the assistance of a pay equity expert, prepare a pay equity plan for the establishment at the Respondent's expense. They also requested an order that the Respondent pay all costs, in particular the costs of experts, incurred by the Applicants in this hearing.

2. In file 0225-91, LCBO applied for a hearing, claiming that the evaluation of the Respondent's position (Gail R. Wells *et al*) conducted by the review officer was flawed and resulted in an incorrect assessment of the value of their position. The Applicant also alleged that the plan as amended by the review officer's Order would be inconsistent with sections 6 and 7 of the *Pay Equity Act, 1987* ("the *Act*"). They requested as a remedy that the Order be quashed and that the plan be restored to its original state.

3. In file 0237-91, the Applicant, Joyce McConnell, claimed that the LCBO had failed to establish compensation practices that provide for pay equity by undervaluing her work in both the posted plan of June 1990 and the amended plan of April 1991. She claimed that the Respondent had chosen an inappropriate male comparator and adopted a gender-biased comparison system. The remedy sought was to amend the LCBO's plan so as to increase her grade level from a grade 7 to a higher level. In the alternative, the Applicant asked that the Tribunal set aside the Respondent's pay equity plans of June 1990 and April 1991, and order that the review officer, with the assistance of a pay equity expert, prepare a pay equity plan for the establishment at the Respondent's expense and that the Respondent pay all costs, including the cost of experts incurred by the Applicant in this hearing.

4. At the pre-hearing held on July 5, 1991, the parties agreed not to argue that any of the other parties had failed in the pleadings to make out a *prima facie* case as had been previously alleged. In fact, the parties were able to complete responses to each other's applications. The parties also agreed that the gender neutrality of the Employer's comparison system was no longer an issue.

5. These files have all come via section 16(4)3 of the *Act*:

> If the plan does not relate to a bargaining unit and a review officer has made an order under subsection 2, the employer or any employee or group of employees to whom the plan applies may file an objection.

6. Section 17(1) requires that the Tribunal hold a hearing when it receives a notice of objection under section 16 and, in its decision, shall settle the pay equity plan to which the objection relates

7. At the beginning of the hearing in the above files, the panel on its own motion raised the question as to whether any of the Applicants had demonstrated a *prima facie* case in their pleadings.

8. Counsel for both the LCBO and for Gail Wells *et al* agreed with the Tribunal's decision in *Peterborough* (21 March 1991) 0151-90 (P.E.H.T.)[now reported at 2 P.E.R. 86] that it must decide whether "the Applicant has made out a case on the face of the written material filed at the application". The decision also stated that "there are times when the Applicant may make out a case which could be rectified by the Tribunal, but does not provide sufficient information for the Respondent to answer the case fully; then the Tribunal might order the Applicant to provide further particulars about the circumstances underlying its claim."

9. LCBO also pointed out that in *Peterborough* the Tribunal found in paragraph 19 that

> In determining whether the applicant has made out a prima facie case, the Tribunal will look at the effect of the application as a whole. It will not require an Applicant to use "technical" or "legal" language, but will look at the sense of the language used by the applicant. The fact than an Applicant raises a "novel" point will not result in dismissal. The Tribunal must also distinguish between those cases in which further particulars are required and those situations to which there is no case at all. It will only dismiss a case without a hearing on the merits when it is "plain and obvious" that a hearing on the merits cannot lead to a result contemplated by the legislation.

10. We agree with the *Peterborough* decision. Although the pleadings in these files may be sparse, the majority do not find it "plain and obvious" that there is no prima facie case in any of these applications. For instance, in file 0223-91, the Applicants stated that the Employer had been inconsistent in the collection of job information, which resulted in the wrong comparator chosen for their job. In file 0225-91, the Applicant stated that the review officer had no information about the job band in which he placed the Respondents' positions; this resulted in the review officer evaluating the female job at too high a level. In file 0237-91, the Applicant claimed that her position was compared to the wrong comparator. We believe that these go beyond bald allegations. In each of these instances, the claims, if proven, could be remedied by the Tribunal.

11. A further consideration that the Tribunal found persuasive was the argument by Counsel for Gail R. Wells *et al* that non-union applicants have little access to information about their employer's pay equity plan. It would therefore be likely that their pleadings would require further particulars which could only be prepared if the Tribunal ordered disclosure by the Employer. We believe that review officers, who have broad investigative powers under the *Act*, including the ability to request the production of documents, and to question persons on relevant matters, can be helpful to both employers and employees during all stages of the process.

12. The Tribunal, in acknowledgement that it is in the early stages of its jurisprudence, has not been stringent with the pleadings. We believe that the potential problem of access to information is further reason to allow a degree of flexibility.

13. We find that each of the Applicants has established a *prima facie* case. We grant the parties leave to provide such further particulars as are necessary in accordance with Rule 1.03 and Rule 2.04 of the Tribunal's Rules of Practice. We request that the parties attend a second pre-hearing to address the need for further particulars and for disclosure. In accordance with the above we adjourn the scheduled hearing dates of October 15, 16, 17, 1991. We direct the Registrar to contact the parties and schedule a pre-hearing on one of those days. Should any issue related to particulars or to disclosure remain outstanding, the panel will deal with them at the resumption of the hearing.

**DECISION OF PATRICIA HUGHES, ALTERNATE CHAIR, OCTOBER 10, 1991**

1. None of these applications establishes a *prima facie* case. Each application requests that we settle the pay equity plan in a specific way, yet gives us no information which, if true, would enable us to do that. When I ask, for each application, "if I assume all the facts set out by the applicant are true, am I able to settle the plan in the manner requested by the applicant?", I am forced to answer "no".

2. In reaching this conclusion, I am guided by the strictures outlined by the Tribunal in *Peterborough* (21 March 1991) 0151-90 (P.E.H.T.) which reflect the law in this area: a case should be dismissed on this basis only in the clearest circumstances; novelty should not in itself result in dismissal; and "technical" or statutory terminology is not necessary to establish a case on the face of the pleadings. Doubt should always be resolved in favour of the applicant.

3. The thrust of *Peterborough* is that there must be a modicum of reality to any application. This is a general principle of law with a commonsense basis. The Tribunal was not established to listen to speculation, whether it comes in the form of a complaint or an objection. Nor was it established as a way of applicants' obtaining information to decide whether they really have a case or not.

4. I refer particularly to the application by the Wells group to explain my difficulty. It objects to the pay equity plan as amended by the Review Officer's order, as well as to the original plan established by the LCBO, on the basis that the work of the Business Systems Analyst IV, the job class to which the Wells group belong, has been undervalued. (The gender neutrality of the plan is no longer in issue; even if it were, however, my conclusions would be the same since the application does not address what is wrong with the comparison system.) I note that the LCBO's evaluation of the BSA IV job class has been superseded by that of the Review Officer who raised its grade level. The application, however, deals only with the LCBO and says nothing about the new and current valuation.

5. The allegation of undervaluation of work is an appropriate one to ground an objection under subsection 16(4) of the *Act*. An allegation must eventually be proved, however. The way in which the applicant intends to prove it is revealed by the "material facts" set out in the application. In this case, the kind of material facts necessary would relate to the actual job class and its rating. But the material facts actually pleaded relate only to the process by which the LCBO did its evaluation. While one may be interested in how a job class came to be undervalued, that issue is secondary to *whether* or *in what way* it has

been undervalued. Those are the questions which must be answered before the plan can be settled in the applicants' favour. Yet the application does not deal with these significant questions at all.

6. Nevertheless, the majority evidently believe that they would be able to conclude from what they have been told in the application that either the LCBO or the Review Officer had in fact undervalued the work performed by the BSA IV job class; they must also believe that they could increase the grade level of the BSA IV job class. I do not know how they could do this on the basis of the application. Before I -- and I assume anyone else -- can decide whether a valuation or "rating" is correct or appropriate, I require information about the work performed by the job class in issue. I need to have some idea, at least, about how it was inappropriately evaluated. For example, were some functions not included? were certain functions rated too low? was the wrong interpretation placed on a particular skill or responsibility?

7. The Wells group's application provides no information whatsoever about the work performed by the BSA IV job class or about what was missed by the evaluation of the job class by either the LCBO, assuming that is still relevant, or by the Review Officer. There are no facts pleaded which could sustain the allegation.

8. Similarly, the LCBO's application provides no basis on which I could conclude that the evaluation of the BSA IV job class in the amended plan is in fact inappropriate. There are no facts pleaded about the way in which the rating *is* inappropriate, just about why we are to conclude that it "must" be.

9. Joyce McConnell simply took the Wells group's application and modified it for her own circumstances. Her own job class, Manager-Payroll, was not explicitly part of the Review Officer's assessment of the plan because she did not object to the Commission until after the Review Officer had amended the plan as a result of the application by the Wells group under subsection 15(7) of the *Act*. Nevertheless, she objects to the evaluation of her job in the amended plan, as well as by the LCBO. I have the same difficulty with the lack of relevant information in her application as I do with the Wells group's application.

10. I comment in passing that unfortunately, there was not an opportunity for Ms. McConnell to use Review Services to assist her in resolving her concerns because she failed to make an original objection; she merely took advantage of being an "employee[] to whom the plan applies" to make her objection to the amended plan (which she does not allege actually affected the evaluation of her job class).

11. My conclusions have been made against the backdrop of the legislation. Nowhere does the *Act* give the Tribunal a general monitoring role. It is not too much to expect, therefore, that if an employee or the employer wishes the Tribunal to look at a plan or amended plan, it should at least be able to communicate in a minimal way what is actually inappropriate about the plan. Joyce McConnell captured what I think is in essence the underlying reason for her application: she said she had no problems with the plan as such but she wanted an expert to evaluate her job. She and, I believe, the Wells group want another evaluation; but they have not pointed to any actual problems with the existing valuation which might warrant any other valuation. I have to conclude, therefore, that they just want to see if someone else will give them a valuation they like better than the one or ones they have already received.

12. I appreciate that the majority believe that the parties could benefit from another pre-hearing in order to focus their cases and exchange information or particulars prior to the resumption of the hearing. It does not surprise me that they consider these applications in their present form to be deficient. On my view

of these cases, of course, additional particulars or details about the facts set out in the applications will not help. All the information in the world about how the evaluation was done by the LCBO or the Review Officer cannot help an adjudicator decide whether the evaluation is in fact appropriate or what way it is inappropriate. And those would be the only particulars appropriately added to these pleadings.

13. I am sure, however, that since the majority have concluded that each of the applications establishes a *prima facie* case in its current form, they do not envision these parties coming forward with entirely new cases, thereby avoiding the ramifications of the 30 day limitation period in subsection 16(4) of the *Act*. I am sure that the pre-hearing opportunity is not intended to ignore the *prima facie* rule which the majority and I agree applies to objections filed under subsection 16(4).

14. I am concerned that the majority's decision will lead employees or employers to think the Tribunal will inquire into unsubstantiated dissatisfaction or disappointment with the results of the pay equity process. I am concerned that employees will believe that the Tribunal will allow them to file objections just for the purpose of obtaining information from the employer. If that is so, we are doing a disservice to all those who are affected by the legislation and our proceedings. We have an obligation to respect the scheme of the legislation and to consider very carefully the ramifications of our decisions on the efficacy of the pay equity process for all employees. Equally important, we do no one a favour by giving false hope about the nature of the assistance we are able to provide.

15. I would therefore have dismissed each of these applications on the basis that it has not established a *prima facie* case.

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**0014-89** Ontario Nurses' Association, Applicant v. City of Timmins, Town of Iroquois Falls, Township of Black River-Matheson, Town of Cochrane, Township of Glackmeyer, Town of Smooth Rock Falls, Township of Wicksteed, Town of Kapuskasing, Township of Fauquier-Strickland, Township of Moonbeam, Township of Val Rita-Harty, Township of Opasatika, Town of Hearst, Township of Mattice-Val Côté, and Porcupine Health Unit, Respondents

**Before:** Mary Ellen Cummings, Vice-Chair, and Members Geri Sheedy and Janet Slone Taylor

**Appearances:** Anne Marie Delorey, Louise McKay and Joanne Wilson for the Ontario Nurses' Association;J. Kenneth Alexander for the Town of Iroquois Falls; J. Paul Wearing and Dr. Alexander Hukowich for the Porcupine Health Unit and no one appearing for the other Respondents

**Cite As: Porcupine Health Unit (No.2)** (1991), 2 P.E.R. 198

**Application of Act - Employer**

**The Tribunal was asked to determine who was the employer for pay equity purposes of the nurses in the bargaining unit represented by the Applicant: the Porcupine Health Unit ("the Health Unit") or the municipalities in the area served by the Health Unit ("the Participating Municipalities")?**

**The Tribunal held that the Health Unit was the employer.**

**In determining the identity of the employer, the Tribunal adopted the approach taken by the majority in *Barrie Public Library Board* (1991) 2 P.E.R. 93, and focused its analysis on who controlled compensation and the valuing of work. In particular, the Tribunal considered who negotiated or set the wages and who decided what labour was to be undertaken and attached that responsibility to a particular job. The Tribunal found that the Health Unit and its staff determined the compensation practices and the valuing of work at the Health Unit without apparent involvement by the Participating Municipalities. Although the Participating Municipalities appoint the members of the Board of the Health Unit, the latter do not act in the interests of or on the direction of the former such that the Participating Municipalities actually control the compensation practices and the valuing of work. The Participating Municipalities control neither the Health Unit's finances nor its programs, nor is there any evidence that the Participating Municipalities work together in directing the activities of the Health Unit.**

## Practice and Procedure – Precedent

The Tribunal was asked to determine the identity of the employer of nurses in the bargaining unit represented by the Applicant. In each of three previous "who is the employer" cases, the Tribunal had adopted a similar approach to this question. In a fourth case, *Barrie Public Library Board* (1991) 2 P.E.R. 93, the Tribunal had departed from this approach. The issue was which approach the Tribunal would use in this case.

The Tribunal adopted the approach in the *Barrie Public Library Board* case.

One panel of an administrative tribunal is not bound to follow the decisions of other panels of the tribunal. Consistency in decision making is very important, however, and departing from an existing line of jurisprudence should not be done lightly. Each panel will hear different arguments and evidence and will bring its own views to the decision making process. Incremental decision making may detract from consistency, but over time it will strengthen the Tribunal's jurisprudence.

## Tribunal Member Geri Sheedy Concurred in The Result:

This is the second health unit employer case before the Tribunal. The first was decided using the tests set out in *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R. 17. Although those tests were never intended to be exhaustive, it was neither necessary or appropriate to expand or alter them in this case when the parties did not argue that they should be changed and when the case involved another health unit. Parties before the Tribunal are entitled to uniformity and certainty in the application of the statute, and the majority has failed to provide that. This case is especially not consistent with the previous health unit case. The existing employer for the collective bargaining process is merely a starting point. The *Act* assumes that systemic discrimination exists, and may be present in the existing collective bargaining relationship. The tests in *Haldimand-Norfolk* were designed to go behind that relationship and look at other areas of control. The majority in this case have narrowed the tests and would not provide the balance or scope necessary in dealing with anti-discrimination legislation. On the *Haldimand-Norfolk* tests, the Health Unit is the employer.

## Champ d'application de la Loi – Employeur

Le Tribunal a été chargé de déterminer l'employeur, aux fins de l'équité salariale, des infirmières comprises dans l'unité de négociation que représentait le requérant : était-ce la circonscription sanitaire de Porcupine («la circonscription sanitaire») ou les municipalités dans les territoires desservis par la circonscription sanitaire («les municipalités participantes»)?

Le Tribunal a statué que la circonscription sanitaire était l'employeur.

Dans son étude de l'identité de l'employeur, le Tribunal a adopté la méthode utilisée par la majorité des membres dans l'affaire du *Conseil des bibliothèques publiques de Barrie* (1991) 2 P.E.R 93. Il a axé son analyse sur l'entité qui réglementait les pratiques de rétribution et la valeur du travail. Il a étudié, plus particulièrement, l'entité qui négociait ou fixait les salaires, qui décidait des tâches qui devaient être accomplies et qui fixait les responsabilités liées à un emploi donné. Le Tribunal a conclu que la circonscription sanitaire et son personnel fixaient les pratiques de rétribution et donnait une valeur au travail. Les municipalités participantes ne semblaient intervenir d'aucune façon. Même si les municipalités participantes nomment les membres du conseil de la circonscription sanitaire, ceux-ci n'agissent pas dans l'intérêt des municipalités ni ne suivent leurs ordres. Donc, les municipalités ne réglementent pas vraiment les pratiques de rétribution et la valeur du travail. De plus, elles ne dirigent ni les finances de la circonscription sanitaire ni ses programmes. Finalement, il n'existe aucune preuve selon laquelle les municipalités participantes dirigent ensemble les activités de la circonscription sanitaire.

## Pratique et procédure – Précédent

On a demandé au Tribunal d'établir l'identité de l'employeur des infirmières comprises dans l'unité de négociation que représentait le requérant. Dans trois causes qu'il a entendues sur l'identité d'un employeur, le Tribunal a adopté une démarche semblable. Dans une quatrième cause, à savoir le *Conseil des bibliothèques publiques de Barrie* (1991) 2 P.E.R. 93, le Tribunal s'est écarté de cette démarche. Dans la présente affaire, la question en litige était de savoir quelle démarche le Tribunal allait adopter.

Le Tribunal a adopté la démarche utilisée dans l'affaire du *Conseil des bibliothèques publiques de Barrie*.

Un comité d'un tribunal administratif n'est pas tenu de suivre les décisions rendues par d'autres comités du même tribunal. Toutefois, l'uniformité du processus décisionnel est très importante et toute déviation du corpus jurisprudentiel existant doit être bien pesée. Chaque comité entendra des preuves et des plaidoiries différentes et apportera son propre point de vue au processus décisionnel. Un processus décisionnel progressif peut dévier de l'uniformité, mais, au fil des années, il renforcera le corpus jurisprudentiel du Tribunal.

## Décision concordante de Geri Sheedy, membre du Tribunal

Il s'agit de la deuxième cause que le Tribunal entend en ce qui concerne une circonscription sanitaire. Les critères précisés dans l'affaire *Haldimand-Norfolk (no 3)* (1989), 1 P.E.R. 17, ont servi à trancher la première cause. Même si ces critères n'ont jamais eu pour objet d'être exhaustifs, il n'a été ni nécessaire ni approprié de les élargir ou de les modifier dans la présente affaire, car les parties n'ont pas prétendu qu'ils devraient être modifiés et que l'affaire concernait une autre circonscription sanitaire. Les parties à une instance devant le Tribunal ont le droit de s'attendre à ce que la Loi soit appliquée avec une certaine uniformité et certitude. La majorité des membres n'ont pas réussi à leur fournir cela. La présente décision n'est pas du tout compatible avec l'autre affaire qui concernait une circonscription sanitaire. L'employeur actuel aux fins du processus de négociation collective n'est tout simplement qu'un point de départ. La *Loi* suppose qu'une discrimination systémique existe et peut se retrouver dans les rapports actuels de négociation collective. Les critères utilisés dans l'affaire *Haldimand-Norfolk* ont été conçus pour aller au-delà de ces rapports et examiner d'autres domaines de réglementation. Dans la présente affaire, la majorité des membres ont limité l'application des critères et n'ont fourni ni l'équilibre ni l'envergure nécessaires pour traiter des mesures législatives anti-discriminatoires. Dans la présente cause selon les critères énoncés dans *Haldimand-Norfolk*, la circonscription sanitaire est l'employeur.

## DECISION OF THE TRIBUNAL, DECEMBER 12, 1991

1. There are two issues to be determined in this case:

Who is the employer of the nurses working at the Porcupine Health Unit?

Did the Porcupine Health Unit breach section 14 of the *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended, (the "Act") by failing to disclose documents during negotiations?

2. The Ontario Nurses' Association ("ONA") applied to the Tribunal with respect to an Order of a Review Officer dated June 22, 1989 which found the Porcupine Health Unit ("the Health Unit") to be the employer of the nurses in the bargaining unit represented by ONA. ONA argued that the employer for the purposes of pay equity is all of the other named Respondents, that is, the municipalities in the area served by the Health Unit. Those municipalities will be called the "Participating Municipalities". ONA also argued that the Health Unit had breached its duty to bargain in good faith by failing to disclose documents that were necessary for pay equity bargaining.

3. Both the Health Unit and the Town of Iroquois Falls argued that the Health Unit is the employer of the nurses. The Health Unit denied that it had breached its duty to bargain in good faith. None of the other Participating Municipalities took part in the proceedings.

4. During the hearing, it became apparent that the names of some of the Participating Municipalities were incorrect or misspelled in the style of cause. The style of cause is therefore amended as follows; "Township of Black-River Matheson" to "Township of Black River-Matheson"; "Corporation of the Township of Hornepayne" to "Township of Wicksteed"; "Townships of Val Rita-Harty" to "Township of Val Rita-Harty"; "Improvement District of Opasatika" to "Township of Opasatika"; and "Township of Mattice-Valcotte" to "Township of Mattice-Val Côté".

### Who is the Employer?

5. The Tribunal has determined the question of who is the employer in four previous decisions; *Haldimand-Norfolk (No. 3)* (1989), 1 P.E.R. 17, *Middlesex and London* (1989), 1 P.E.R. 89, *Metropolitan Toronto Library Board* (1989), 1 P.E.R. 112 and *Barrie Public Library Board*, (30 April 1991) 0048-90, 0059-90 and 0067-90 (P.E.H.T.). In *Haldimand-Norfolk (No. 3)* the panel articulated four tests or criteria to be used in making the determination. Although the *Haldimand-Norfolk (No. 3)* decision said that these tests were not exhaustive, they were used by the Tribunal in both *Middlesex and London* and *Metropolitan Toronto Library Board*, with some further refinement.

6. In *Barrie Public Library Board*, a majority of the panel, which was chaired by the same Vice-Chair as in this case, proposed a change in focus. The approach taken is based on the view that the *Act* envisioned, in the majority of cases, that pay equity would be established within the employment and collective bargaining relationships that predated the *Act*. In *Barrie Public Library Board* the majority wrote that in determining the question of who is the employer, the starting point for the analysis was identifying the entities to those pre-existing relationships. However, the Legislature's decision not to define "employer" recognised that the Tribunal might have to look beyond those existing structures. The majority then went on

to say that looking at who controls the compensation practices and the valuing of work was the appropriate focus because the thrust of the *Act* is on reviewing compensation practices and the valuing of work.

7. In that decision, the majority found it useful to use parts of the tests set out in *Haldimand–Norfolk (No. 3)* to the extent that they assist in determining which entity controls the compensation practices and the valuing of work. The majority used the tests set out in the first and second criteria to determine which entity had indirect or direct control over the compensation practices and the valuing of work. The majority placed particular reliance on the part of the second test that asks "what is the labour relations reality, who negotiates the wages and benefits with the union or who sets the wages in the non–unionised setting?". The majority also found it useful to use the part of the third test that asks "who decides what labour is to be undertaken and attaches that responsibility to a particular job?". The evidence in that case was assessed using those criteria. It should be noted that a request for reconsideration of *Barrie Public Library Board* has been made.

8. At the time that the parties were arguing this case, the *Barrie Public Library Board* decision had not been released. These parties based their arguments on the *Haldimand–Norfolk (No. 3)* tests, although ONA proposed that we also expand the tests to look at which entity has control over programming. ONA also specifically argued that we should continue to use and apply the tests set out in *Haldimand–Norfolk (No. 3)*.

9. Before argument was concluded, the panel asked the parties for their views on the possibility of changing the focus from the *Haldimand–Norfolk (No. 3)* tests to considering either exclusively or with greater weight the criteria of who has control over the compensation practices and the valuing of work. ONA again argued that the panel should continue to follow the approach set out in *Haldimand–Norfolk (No. 3)* because it best achieved the goals of the *Act*. Further, ONA argued that a consistent approach by the Tribunal to the employer issue was essential given the short time available under the *Act* for the implementation of pay equity.

10. The Health Unit argued that placing a greater emphasis on who controls compensation practices and the valuing of work would not alter the outcome of the case but that the Tribunal should not look exclusively at those factors, because others may be useful in a determination of the issue. The Health Unit proposed using who controls compensation practices and the valuing of work as a st ting point. The Health Unit and the Town of Iroquois Falls argued that a greater emphasis on the criteria of who controls compensation practices and the valuing of work was consistent with the scheme of the *Act*.

11. A panel of an administrative tribunal is not bound to follow the decisions of other panels of the tribunal. In fact, it would be a fettering of discretion if a different panel were to simply follow the reasoning of an earlier decision, without considering the evidence and argument presented in the new case. However, there is no doubt that consistency in decision–making at an administrative tribunal is very important. Consistency provides the community served by the tribunal some predictability and the possibility of reaching agreements without need to resort to litigation. Given the importance of consistency, departing from an existing line of jurisprudence should not be done lightly.

12. While it is true that initial implementation of pay equity will happen over a short period of time, it is still important for the Tribunal to build its jurisprudence in an incremental way. It is impossible to predict

the range of cases that will be argued or the many possible ways of interpreting the *Act*. While consistency is an important goal of the Tribunal, each panel consists of individual adjudicators who will hear different arguments and evidence in each case, and who will bring their own views to the decision-making process. Although the important goal of consistency will not be met in each case, over time, incremental decision-making will inevitably strengthen the Tribunal's jurisprudence.

13. The approach taken by the majority in *Barrie Public Library Board* is a departure from the Tribunal's previous jurisprudence, but for the reasons set out in that decision, it is an approach that is consistent with the scheme of the *Act* and which still meets the goals of the *Act*. The same approach will be used by the majority in this case.

14. ONA argued that for the purposes of pay equity, the Participating Municipalities should be found to be the employer of the nurses. It was argued that the Participating Municipalities exercise both direct and indirect control over Health Unit operations, including its compensation practices and the valuing of work. ONA argued that indirect control exists because the Participating Municipalities appoint the majority of the members of the Board of Health of the Porcupine Health Unit ("the Board"). ONA further argued that the Participating Municipalities exercise direct control through their ability to approve or withhold approval for program submissions that impact on the numbers of staff who will be hired. It was argued that they also exercise control over the finances of the Health Unit because the Participating Municipalities fund 25% of "cost-shared" programs.

**The evidence**

15. The Health Unit was established in 1944 under the legislative predecessors to the *Health Protection and Promotion Act, 1983*, S.O. 1983, c.10, as amended (the "*H.P.P.A.*"). The Health Unit is responsible for providing public health services to the citizens in a geographical area that includes parts of the Territorial Districts of Cochrane, Kenora, Algoma and Timiskaming (see O. Reg. 236/84). The main office of the Health Unit is in Timmins and there are several branch offices.

16. The Health Unit's activities are governed by the *H.P.P.A.* and its Regulations. The *H.P.P.A.* establishes both the structure and operations of a health unit. It requires that health units be governed by boards of health composed of members appointed by the municipalities within the geographical area that the health unit serves. It also provides that the Province may appoint members to a board of health. Regulation 524/89 pursuant to the *H.P.P.A.* determines the composition of the Board. The Board consists of 12 members appointed by the Participating Municipalities and 2 members appointed by the Province. The City of Timmins appoints 4 members. The Town of Iroquois Falls, the Township of Black River-Matheson, the Town of Smooth Rock Falls, the Town of Hearst and the Township of Wicksteed each appoint one member. The Town of Kapuskasing, the Township of Moonbeam and the Township of Fauquier-Strickland jointly appoint one member. The Town of Cochrane and the Township of Glackmeyer jointly appoint a member as do the Township of Mattice-Val Côté, the Township of Opasatika and the Township of Val Rita-Harty.

17. Over the years the Participating Municipalities have generally appointed municipal councillors to the Board, although that is not required. For example, the appointee of the Town of Iroquois Falls, who has been on the Board for 28 years, has never held municipal office.

18. The Board meets regularly and has a number of committees that report to it. The committees are Finance; Personnel, Property and Negotiations; Program; and Executive. The Medical Officer of Health, who is the chief executive officer of the Health Unit, attends all Board and committee meetings. There are a number of Directors and Supervisors in the various program areas who report to the Medical Officer of Health.

19. ONA and the Porcupine Health Unit have negotiated collective agreements since ONA was certified as the bargaining agent. All labour relations matters have been dealt with by the Health Unit, rather than the Participating Municipalities. All day to day direction of staff is provided by Health Unit directors and supervisors. The Health Unit does all of the hiring, and training of staff. Working conditions and performance evaluations are determined by Health Unit supervisors. Therefore, the employer in the existing collective bargaining and employment relationship is the Health Unit.

20. The Medical Officer of Health, Dr. Alexander Hukowich, and the Directors and Supervisors comprise the Management Committee. This Committee makes the decisions about what kinds and numbers of staff are needed in each program, taking into account service needs and available funding. It prepares strategies for collective bargaining, including wage and benefit proposals. The Committee reviews the old collective agreement, and proposes changes. It also looks at wages in other health units and the local labour market to recommend what monetary proposals should be made.

21. Management staff both participate and act as a resource for Board members in collective agreement negotiations. Management determines personnel policies, and sets wages for non-union staff.

22. While the nurses at the Health Unit are directed by the Health Unit's Supervisors, Directors, and the Medical Officer of Health, the Board has a role in overseeing those activities. The Personnel, Property and Negotiation Committee of the Board reviews management salary increases, personnel policies, benefit enrichment proposals, extended leaves of absence and the like. The members of that Committee set the collective bargaining strategy, participate in negotiations with ONA and hear third level grievances under the collective agreement. The whole Board ratifies the collective agreements. With respect to all of these activities the Board usually acts on the recommendation of management staff, whose views are conveyed through Dr. Hukowich.

23. On the face of it, the Board of Health and its management staff determine the compensation practices and the valuing of work at the Health Unit without apparent involvement by the Participating Municipalities. At issue is whether, on closer examination, the Participating Municipalities, through their appointment of the majority of Board members and their direct involvement in the Health Unit's operations, actually control the compensation practices and the valuing of work.

24. ONA's argument is in large part based on the premise that Board members are not just the appointees of the Participating Municipalities, but are in every sense their representatives. That is, that the appointees act in the interests of the municipalities and more importantly, act on the direction of their appointing municipality. However, the extensive evidence we received does not bear that out. Board members act in the interests of the citizens in the geographic area that the Health Unit serves. In many cases, that interest is similar to the interest of the Participating Municipalities. For example, Board efforts to obtain more funding from the Province, either for new or existing programs, benefit both the Participating

Municipalities and the citizens in the geographic area because it means that more services will be provided at less cost to local taxpayers.

25. There were however, instances where the Board took positions that were not in the interests of the Participating Municipalities. One example will suffice. In 1989, the City of Timmins sent a letter to the Health Unit saying that the City Council had directed that grants to organisations that the City supported would be limited to an increase of 5% over the previous year. However, the Board set a per capita increase of 6.9% over the previous year. In Board Minutes outlining the deliberations around setting the per capita levy it was one of the appointees of the City of Timmins who said that the Board should be united in explaining to all the Participating Municipalities that the 6.9% increase was necessary. Clearly, that appointee was acting in the interests of the Health Unit, not the City of Timmins.

26. The evidence of Irene Charlebois, the appointee of the Town of Iroquois Falls also established that Board members do not take their instructions from the municipalities that appoint them. Ms. Charlebois has been appointed to the Board by the Town of Iroquois Falls or its predecessor municipalities over a period of 28 years. She is a retired school principal and teacher who has never held municipal office. During those 28 years, she has met with Town Council on 3 or 4 occasions, and always at her request. She sought those meetings to bring Council up to date on the activities of the Health Unit and to make Council aware of the services the Health Unit provides. During her tenure on the Board, she has never been told what positions to take at the Board, nor has she ever sought instructions from the Town. She sees her role on the Board as a representative of all the citizens in the area served by the Health Unit. In the Minutes of Board meetings, it is obvious that Ms. Charlebois has a special interest in issues that touch the community of Iroquois Falls, but the evidence falls short of establishing that she represents the municipal government of Iroquois Falls.

27. Frank Krznaric, the Chairman of the Board and a Timmins Councillor who has been on the Board for 11 years also testified that he has never sought or received instructions from City Council with respect to activities at the Health Unit. He sees himself as a representative for all of the citizens served by the Health Unit. He believes that his mandate as a Board member comes from the *H.P.P.A.*, not the City of Timmins. He testified that the City of Timmins has never tried to influence or direct his activities at the Health Unit.

28. In summary, there is no evidence that the Board members act in the interests of the particular municipality that appoints them. From time to time, Board members have indicated that they are concerned about issues relating to their particular municipality, such as the level of service provided to citizens, or conditions in the branch Health Unit office in their community, but that is consistent with their role as local representatives on a board of health.

29. All of the evidence, and particularly the testimony of Dr. Hukowich, establishes that the Board is a policy making body; it is not involved in the day to day operations of the Health Unit. However, Dr. Hukowich and the management staff not only direct the day to day operations, but also have a very significant role in guiding the overall approach of the Health Unit. Without discounting the Board's policy making role, it is evident that Dr. Hukowich significantly influences the Board's decisions. While his recommendations are certainly discussed by the Board, the Board generally follows them. The evidence shows that Dr. Hukowich, who has been the Medical Officer of Health for 13 years, is the dominant force in developing and implementing the Health Unit's mandate.

30. As outlined earlier, ONA also argued that the Participating Municipalities' control the Health Unit by their direct involvement in the Health Unit's operations. Evidence was led respecting the Participating Municipalities' role in programming, finances and other Health Unit activities.

31. The *H.P.P.A.* outlines mandatory programs that all health units must provide. The legislation also allows health units to provide optional programs where the board of the health unit believes that they are necessary or desirable and the municipalities in the area approve. The Health Unit's programs are funded in two ways: "cost-shared" and "non cost-shared". The "cost-shared" are funded 75% by the Ministry of Health and 25% by the Participating Municipalities. The "non cost-shared" are funded 100% by the Ministry of Health. All but two of the Health Unit's programs are "non cost-shared". Of the Health Unit's total funds in 1989, for example, 90% were provided by the Ministry of Health. The Participating Municipalities funded 8%. Small amounts also came from the Ministry of Community and Social Services, the Ministry of the Environment, and area boards of education.

32. The Participating Municipalities provide their funding by way of a per capita levy. For "cost-shared" programs the Board strikes budgets, then levies the Participating Municipalities for 25% of those costs. The Province pays the rest. Each municipality's contribution is determined by its population, hence the term per capita levy.

33. Each of the programs provided by the Health Unit is funded by an individual budget which is prepared by staff, submitted to the Finance Committee of the Board for review and approval, then to the Board for approval. The budget is then sent to the Ministry of Health where a line by line analysis is performed and then returned to the Health Unit. The Ministry may approve the budget as submitted or may make changes. Although the Participating Municipalities are also sent a copy of the budget that relates to the "cost-shared" programs, they have never sought to amend them.

34. The budgets of the Health Unit are administered by the staff of the Health Unit on a day to day basis, with overseeing by the Finance Committee of the Board and the Board itself. The Participating Municipalities have played no role.

35. The Participating Municipalities' contribution to the Health Unit's operating expenses does not give the Participating Municipalities control, either directly or indirectly, over the Health Unit's finances. The Participating Municipalities contribute only a small amount to the Health Unit's operating expenses. More important, the Board of the Health Unit determines its budgetary needs and then invoices the Participating Municipalities for their portion. There was no evidence that any of the Participating Municipalities has ever questioned the per capita levy, apart from the occasional dispute about the correct population count of the municipality. There was no evidence that a Participating Municipality has ever refused to pay the levy, or questioned how the figure was arrived at. The Participating Municipalities appear to view the Health Unit as an independent entity, part of whose costs the Participating Municipalities are obliged to pay.

36. The Health Unit has sent the Participating Municipalities proposals for both "cost-shared" and "non cost-shared" programs, requesting that they be approved by the municipality so that the proposal can be submitted to the Ministry of Health. The Health Unit advises the Ministry that program proposals have been submitted to the Participating Municipalities, but the Health Unit does not wait until it has received the approvals before submitting the program proposal to the Ministry. According to the evidence of Dr.

Hukowich, submitting program proposals to the Participating Municipalities is a formality which the Health Unit undertakes, largely because the Ministry of Health requires it.

37. When the Health Unit has requested municipal approval of program proposals, the Participating Municipalities have not responded in any uniform way; some Participating Municipalities send the Health Unit a resolution of council approving the program, some do not respond. Sometimes, Municipalities approve in principle, or approve subject to full funding by the Province. At least once, a Municipality declined to approve a program because it believed that it replicated one that was already in place in the community. However, the Health Unit continued in its bid to provide that program. In summary, approval or lack of approval by the Participating Municipalities does not impact on the Health Unit's programming initiatives.

38. The Participating Municipalities do not have the control over programs that ONA suggests. While it is possible that the ability to determine programming could result in control over compensation practices and the valuing of work, the Participating Municipalities simply do not have much of a role in programming.

39. If ONA's argument that the Participating Municipalities effectively control the Health Unit is to succeed, there would also have to be evidence that the Participating Municipalities work together in directing the activities of the Health Unit. Such evidence is, indeed, critical to ONA's case. However, with two exceptions, there is no indication that the Participating Municipalities act together. The first exception is the 1975 Agreement that the Participating Municipalities entered into, whereby they agreed to share the expenses of the Health Unit and determined that the costs would be shared on a per capita basis. As already noted, in fact, the Participating Municipalities share only a portion of the expenses incurred by the Health Unit. The second exception is a 1986 Agreement entered into by the Participating Municipalities to facilitate the building of a new Health Unit office.

40. There was little evidence about the circumstances surrounding the signing of the 1975 Agreement, other than that the predecessor to the *H.P.P.A.* required that municipalities who came together to form a health unit reach agreement as to how costs would be shared. The 1986 Agreement permitted the Health Unit to construct a building and then lease it back to itself.

41. Those two instances were the only evidence of joint activity by the Participating Municipalities, and they are not sufficient to establish that the Participating Municipalities work together to control the Health Unit.

42. Municipal Council Minutes for nearly all of the Participating Municipalities were put into evidence. Those Minutes show that the Participating Municipalities appear to have different levels of interest in Health Unit activities. Some Participating Municipalities refer Health Unit items to committees of Council. Some appear to do nothing other than receive the Health Unit's correspondence. We saw no evidence that any Council of a Participating Municipality deliberated any Health Unit issues. Mr. Krznaric testified that during his tenure, the Council of the City of Timmins has never sought to have input in the health services provided by the Health Unit.

43. Often the Participating Municipalities take different views on initiatives of the Health Unit. For example, when the Health Unit asked for the support of Participating Municipalities in lobbying for amendments to the *Fluoridation Act*, R.S.O. 1980, c.171, which would have placed responsibility for fluoridation of municipal water supplies in health units, instead of municipalities, some Participating Municipalities agreed and others opposed the Health Unit's initiative. Still, the Health Unit continued in its efforts to get the amendment. There is insufficient evidence that the Participating Municipalities speak as one voice with respect to the operations of the Health Unit.

44. Although there have been instances when a Participating Municipality has written to the Health Unit on a matter of local concern, such as the location of a proposed new Health Unit office in the Town of Hearst, the vast majority of communication with the Participating Municipalities is at the instigation of the Health Unit. And even in cases where a Participating Municipality has expressed a concern about a Health Unit issue, the evidence does not establish that the Health Unit has acted in accordance with the Municipality's wishes.

45. We conclude that the Board of the Health Unit takes its mandate from the *H.P.P.A.* and acts in the interests of the citizens in the geographic area it serves, independent of the Participating Municipalities. The evidence discloses that this independence is acknowledged by the Participating Municipalities.

**Decision**

46. We identified the Health Unit as the employer of the nurses in the employment and collective bargaining relationship that existed prior to the *Act*. We also found that the Board of the Health Unit and its Supervisors, Directors and the Medical Officer of Health appeared to establish the compensation practices and the valuing of work for the nurses. We then reviewed the evidence to determine if the Participating Municipalities either directly or indirectly control the compensation practices and the valuing of work to such an extent that the Participating Municipalities should be found to be the employer for the purposes of pay equity. We conclude that the Participating Municipalities control none of the Health Unit's activities, much less its compensation practices and the valuing of work. The evidence points clearly to the Health Unit as the employer.

47. The majority concurs with our colleague, Ms. Sheedy, in her finding that the outcome of this case would not be changed by the application of the criteria in *Haldimand–Norfolk (No.3)*.

48. Therefore, we find that the Health Unit is the employer of the nurses. Accordingly, we confirm the Order of the Review Officer.

**Bargaining in Bad Faith**

49. ONA argued that the Health Unit violated section 14 of the *Act* in failing to disclose necessary documents during the course of negotiations. During the hearing, ONA advised that it was satisfied with the disclosure that the Health Unit had provided for the purposes of the hearing, although it was maintaining its position that that Health Unit had breached its duty to bargain in good faith with respect to disclosure in negotiations.

50. It would not be useful to determine whether the Health Unit breached its duty to bargain in good faith. Since ONA was satisfied that it had the necessary documents for the hearing, the only remedy that could be ordered, that is the production of those documents, would be futile. Therefore, the issue is moot.

**DECISION OF TRIBUNAL MEMBER, GERI SHEEDY, DECEMBER 12, 1991**

1. I concur with the majority on the finding that the Porcupine Health Unit is the employer of the nurses working at the Porcupine Health Unit.

2. I dissent from the majority on the tests used to reach that conclusion.

3. This is the second case before the Tribunal dealing with a health unit. The first case *Middlesex and London* (1989), 1 P.E.R. 89, was decided using the tests set out in *Haldimand–Norfolk (No. 3)* (1989), 1 P.E.R. 17. As expected the parties in this case argued and presented their evidence to those tests. There

was good reason to do this as three different panels had unanimously adopted the same tests to determine who is the employer. Although the panel in *Haldimand-Norfolk (No. 3)* said in their decision that these tests were not exhaustive and there may be a need in the future to expand or alter the tests, it was neither necessary nor appropriate to do so in this case. The parties did not argue a change in the tests and both felt they could win their case on the tests used in three previous decisions, especially the case which involved another public health unit.

4. As a member of the panel in *Metropolitan Toronto Library Board* which stated "Employers, employees and trade unions are entitled to uniformity and certainty in the application of this statute", I feel the majority decision in this case, has failed to provide that uniformity. It is especially not consistent with the previous health unit case on employer which used the tests set out in *Haldimand-Norfolk (No. 3)*. In his decision in *Barrie Public Library Board*, where he dissented from the majority, member Bruce Budd stated: "A consistent approach to decision-making permits parties to predict the outcome of their disputes. This predictability in turn allows the parties to negotiate in the least costly manner and with the potential for highly consensual results." I agree.

5. The Tribunal in *Middlesex and London* stated that, while the existing employer for collective bargaining purposes is persuasive, it is not determinative. It is merely a starting point. The *Act* expressly assumes that systemic discrimination exists which, by definition, may be present in the EXISTING collective bargaining relationship. The tests in *Haldimand-Norfolk* were designed to go behind that relationship and look at other areas of control, and to provide a balance, always keeping the purpose of the *Act* in mind.

6. The majority in this case, as well as in the *Barrie Public Library Board* have in fact narrowed the tests and would not provide the balance or scope necessary when dealing with anti-discrimination legislation. In this case in applying all the factors in the *Haldimand- Norfolk* tests to the evidence, I would reach the same conclusion as the majority. I would not use the fourth test in this case as the first three tests clearly indicated the health unit as the employer. There was no need to apply the fourth test to the evidence to reach a conclusion.

7. The Tribunal in this case would have reached the same decision using the *Haldimand-Norfolk* tests and I believe it would have served these parties and others who will appear before us in the future, in a better and more consistent way.

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**0122-90** Canadian Union of Public Employees, Applicant v. Corporation of the City of Gloucester, Respondent

**Before:** Beth Symes, Chair, and Members Geri Sheedy and Janet Slone Taylor

**Appearances:** Nancy Rosenberg, Irene Harris, Gail Wright, Cathie Ferguson, Sabina Fatemizadeh for the Applicant, Canadian Union of Public Employees; Frances Crowhurst, Kathryn Campbell, Jock Jardine and Wendy Van Lunen for the Respondent, Corporation of the City of Gloucester

**Cite As: Gloucester (No.2) (1991), 2 P.E.R. 208**

**Pay Equity Act - Adjustments - Entitlement**

**The job rate for a female job class in the Respondent's establishment was $222.60 bi-weekly less than the job rate for the comparably valued male job class. There were six salary increments for each job class. Some members of the female job class were paid at a rate lower than the job rate. The issue before the Tribunal was how to adjust the rates of compensation for the incumbents in the female job class.**

**The Tribunal held that the rate of compensation for the members of the female job class at each step should be adjusted to equal the rate of compensation paid to members of the male job class at the corresponding step of their salary range.**

**The Applicant argued that the rate of compensation for each step in the female job class should be increased by $222.60. Under this method of adjustment, some steps in the female job class would be paid more than the same steps in the comparably valued male job class. The Respondent argued that this result would be illogical, unfair and difficult to administer. It proposed that the female job class should be paid in accordance with the salary range for the comparable male job class.**

Section 6(1) of the *Act requires* that pay equity is achieved when the job rate for the female job class is at least equal to the job rate of the male class to which it has been compared. The job rate for the female job class must be increased by $222.60. The application of s. 6(1) does not resolve how to adjust the compensation for incumbents in the female job class.

Section 9(3) of the *Act* provides that if a job class is to receive an increase in the rate of compensation all positions in the job class shall receive the same dollar adjustment. This section refers to *positions* in a job class; it does not refer to *incumbents*. "Position" is the work performed, not the person who performs the work; position is not identical to "incumbent"; and there may be one or more incumbents occupying a position. In this bargaining unit, an employee does not move from position to position each year. Rather, an employee occupies a position and moves through the range of salary rates for that position in steps. An increment level in a range of salary rates is not a position. Section 9(3) prohibits adjustments to compensation which are arbitrary or discriminatory between positions in a job class, but it does not answer the question of how to adjust the compensation of the incumbents in the female job class who are at various increment levels within the salary range.

Whatever method of adjustment is agreed to, it must provide an effective remedy for systemic discrimination in compensation for employees in undervalued female job classes. It would not be appropriate to deny any compensation adjustments to employees who are below the job rate. Mere access to the male job rate for the employees in the undervalued female job class is not enough. The range of salary rates for the female job class should be moved to the same range of salary rates for the male job class of comparable value. Both male and female incumbents will receive the same rate at each step of the range, based on seniority and merit. The incumbents in the female job class will reach the job rate in the same number of steps as the incumbents in the female job class. This approach will maintain the relationship between the steps in the female job class. This method of adjustment also makes good compensation sense. The *Act* requires the employers to establish and maintain pay equity and this method of adjustment would be easier to maintain than would a "shadow grid" unique to the female job class.

### Tribunal Member Geri Sheedy Dissented:

The question becomes, what is the definition of "position" as used in s. 9(3) of the *Act*? The term is not defined in the *Act*, and is in fact used in different ways in different sections. Since the term is undefined and since its meaning is not consistent throughout the *Act*, it is necessary to provide a definition that makes sense in the context in which it is used. To determine the meaning of "position" in s. 9(3), it is helpful to examine the reasons for which s. 9(3) was included in the *Act*. It was an amendment proposed in the Justice Committee hearings. From the discussion surrounding the passing of this amendment, it is clear that the intent of the amendment was to adjust each level within a female job class by the same dollar amount throughout the grid. The Committee chose to use the term "position" to describe such levels. Given that the *Act* was intended to redress wage discrimination for all women, particularly those at the bottom wage rates, it does not make sense to suggest that only those women who are at the top level of their salary range would receive an adjustment. The provision is included in s. 9 of the *Act* which deals with the rights of individual employees -- it prohibits an employer from giving all women in the female job class found to be comparable to a male job class anything other than equal dollar amounts.

To do as the majority suggests and conclude that s. 9(3) does not address the issue in dispute would leave only s. 6 to determine how pay equity is to be achieved. If this were the case, once the female job rate has been adjusted and is made equal to the job rate of the male comparator the parties need go no further. Since "job rate" is defined as the highest rate of compensation, only those employees in female job classes at the highest rate of pay would receive any adjustment. The majority suggests all women must get an increase, but does not show how this would happen, or what part of the *Act* is relied on.

### Loi sur l'équité salariale – Rajustements de la rétribution

La différence entre le taux de catégorie relié à une catégorie d'emplois à prédominance féminine et celui relié à la catégorie d'emplois à prédominance masculine ayant une valeur comparable dans l'établissement de la partie intimée s'élevait à 222,60 $ toutes les deux semaines. Chaque catégorie d'emplois comportait six augmentations de salaire. Certaines travailleuses appartenant à la catégorie d'emplois à prédominance féminine touchaient une rétribution inférieure au taux de catégorie. Le Tribunal devait décider de la façon de rajuster les taux de rétribution des titulaires de poste de la catégorie d'emplois à prédominance féminine.

Le Tribunal a statué que le taux de rétribution des membres de la catégorie d'emplois à prédominance féminine à chaque échelon devrait être rajusté pour être égal au taux de rétribution des membres de la catégorie d'emplois à prédominance masculine de l'échelon correspondant de leur échelle de salaires.

Le requérant a soutenu que le taux de rétribution de chaque échelon de la catégorie d'emplois à prédominance féminine devrait être majoré de 222,60 $. En vertu de ce mode de rajustement, les travailleuses se trouvant à certains échelons de la catégorie d'emplois à prédominance féminine toucheraient une rétribution supérieure à celle de leurs homologues se trouvant aux mêmes échelons de la catégorie d'emplois à prédominance masculine ayant une valeur comparable. L'intimé a fait valoir que ce mode était illogique, injuste et difficile à administrer. Il a proposé que l'échelle de salaires des membres de la catégorie d'emplois à prédominance féminine soit identique à celle de la catégorie d'emplois à prédominance masculine jugée comparable.

Le paragraphe 6 (1) de la *Loi* précise que l'équité salariale est atteinte lorsque le taux de catégorie relié à la catégorie d'emplois à prédominance féminine est au moins égal au taux de catégorie relié à la catégorie d'emplois à prédominance masculine qui a fait l'objet de la comparaison.

Le taux de catégorie relié à la catégorie d'emplois à prédominance féminine doit être majoré de 222,60 $. L'application du paragraphe 6 (1) ne règle pas la question du mode de rajustement de la rétribution des titulaires de poste de la catégorie d'emplois à prédominance féminine.

Le paragraphe 9 (3) de la *Loi* prévoit que si le taux de rétribution d'une catégorie d'emplois doit être majoré, tous les postes dans cette catégorie d'emplois doivent recevoir le même taux de rajustement, en termes absolus. Ce paragraphe renvoie aux *postes* dans une catégorie d'emplois et non aux *titulaires d'un poste*. Le «poste» désigne le travail accompli et non la personne qui effectue le travail. Le poste ne correspond pas au ou à la «titulaire du poste» et plus d'une personne peut occuper un poste. Dans l'unité de négociation qui nous intéresse, un employé ou une employée ne change pas de poste d'année en année. Il ou elle occupe plutôt un poste et passe d'un échelon à l'autre de l'échelle salariale reliée au poste en question. Un échelon particulier dans une échelle salariale ne correspond pas à un poste. Le paragraphe 9 (3) interdit tout rajustement de la rétribution qui est arbitraire ou discriminatoire entre les postes d'une catégorie d'emplois. Cependant, il ne traite pas du mode de rajustement de la rétribution des titulaires de poste de la catégorie d'emplois à prédominance féminine qui se trouvent à divers échelons de l'échelle salariale.

Quel que soit le mode de rajustement convenu, il faut qu'il prévoit un recours efficace en cas de discrimination systémique en ce qui concerne la rétribution des travailleuses appartenant aux catégories d'emplois à prédominance féminine sous-évaluées. Il ne serait pas approprié de refuser tout rajustement de la rétribution aux employées dont le taux de rémunération est inférieur au taux de catégorie. Le simple accès des travailleuses de la catégorie d'emplois à prédominance féminine sous-évaluée au taux de catégorie de la catégorie d'emplois à prédominance masculine ne suffit pas. La fourchette des échelles de salaires de la catégorie d'emplois à prédominance féminine devrait correspondre à celle de la catégorie d'emplois à prédominance masculine ayant une valeur comparable. Les titulaires de poste masculins et féminins toucheront le même taux de rémunération à chaque échelon de la fourchette, compte tenu de leur ancienneté et de leur mérite. Pour atteindre le taux de catégorie, les titulaires de poste de la catégorie d'emplois à prédominance féminine devront gravir le même nombre d'échelons que les titulaires de poste de la catégorie d'emplois à prédominance masculine. Cette méthode maintiendra les rapports entre les échelons de la catégorie d'emplois à prédominance féminine. Ce mode de rajustement est également logique du point de vue de la rétribution. La *Loi* exige en effet que les employeurs établissent un programme d'équité salariale et ce mode de rajustement serait plus facile à maintenir qu'une grille de rémunération propre à la catégorie d'emplois à prédominance féminine.

### Dissentiment de Geri Sheedy, membre du Tribunal

La question est de savoir ce que le terme «poste», tel qu'utilisé au paragraphe 9 (3) de la *Loi*, signifie. La *Loi* n'en donne aucune définition et le terme a des acceptions différentes dans plusieurs articles. Étant donné que le terme n'est pas défini et que sa signification n'est pas uniforme dans le texte de la *Loi*, il importe de fournir une définition qui est logique compte tenu du contexte. Afin d'établir l'acception du terme «poste» au paragraphe 9 (3), il convient d'examiner les raisons pour lesquelles ce paragraphe a été inclus dans la *Loi*. Il s'agit, en fait, d'une modification proposée lors des audiences qu'a tenues le Comité de la justice. Il est évident, d'après les discussions relatives à l'adoption de cette modification, que l'objet de la modification était de rajuster chaque niveau au sein d'une catégorie d'emplois à prédominance féminine en lui affectant la même valeur, en termes de dollars, à travers l'ensemble de la grille. Le Comité a décidé d'utiliser le terme «poste» pour décrire ces niveaux. Étant donné que l'objet de la *Loi* était d'éliminer la discrimination exercée à l'encontre de toutes les femmes en matière de rétribution, et plus particulièrement en ce qui concerne celles qui se trouvent au bas de l'échelle de salaires, il n'est pas logique de proposer que seules celles qui se trouvent au sommet de leur échelle de salaires devraient bénéficier d'un rajustement. Cette disposition est comprise à l'article 9 de la *Loi*, qui traite des droits de chacun des employés -- elle interdit à un employeur de donner à toutes les femmes qui appartiennent à une catégorie d'emplois à prédominance féminine jugée comparable à une catégorie d'emplois à prédominance masculine un autre avantage qu'une rétribution égale en termes de dollars.

Si on fait ce que la majorité propose et qu'on conclut que le paragraphe 9 (3) ne traite pas de la question en litige, on ne peut s'appuyer, par la suite, que sur l'article 6 pour définir les moyens d'atteindre l'équité salariale. Si tel était le cas, dès que le taux de catégorie de la catégorie d'emplois à prédominance féminine a été rajusté et est devenu égal au taux de catégorie de la catégorie masculine qui sert aux fins de la comparaison, les parties n'auraient pas besoin d'aller plus loin. Étant donné que le «taux de catégorie» est défini comme le taux de rétribution le plus élevé, seules les employées des catégories d'emplois à prédominance féminine qui touchent le taux de rétribution le plus élevé bénéficieraient d'un rajustement. La majorité des membres estiment que toutes les travailleuses doivent recevoir une augmentation, mais ils n'expliquent pas comment cela devrait se produire, ni ne précisent sur quel article de la *Loi* ils se fondent.

## DECISION OF BETH SYMES, CHAIR AND JANET SLONE TAYLOR, MEMBER, DECEMBER 18, 1991

1. In a decision dated February 18, 1991, the Tribunal directed the Corporation of the City of Gloucester (the "City") and the Canadian Union of Public Employees ("CUPE") to resume pay equity negotiations[1] . The panel agreed to remain seized if there were any disputes with respect to these issues.

2. On May 15, 1991, CUPE advised the Tribunal that pay equity negotiations had broken down and that there were a number of issues to be determined by the Tribunal.

3. The parties were able to reach agreement on all but one issue. The issue in dispute is how to adjust the rates of compensation for the incumbents in the female job classes.

### Facts

4. In collective bargaining, the City and CUPE have negotiated a compensation system which has eight salary levels[2] . Within each salary level, an employee progresses through the grid in six steps. Normally, a new employee would be hired at the start rate, that is at step "A"[3] . Employees normally receive an annual adjustment based on their service and merit.

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1. *Gloucester* (18 February 1991) 0122-90 (P.E.H.T.) at p.14
2. Collective Agreement between the City and CUPE 1989-90, Exhibit 2, Appendix "A"
3. Collective Agreement, supra, article 22.01

The City has the right to deny an increment increase to an employee[4], but that would be unusual. The salary grid effective January 1, 1990 was:

| GROUP | A | B | C | D | E | F |
|---|---|---|---|---|---|---|
| LEVEL | $ | $ | $ | $ | $ | $ |
| 11 | 672.39 | 697.50 | 723.76 | 750.02 | 778.55 | 807.09 |
| | 17,482.00 | 18,135.00 | 18,818.00 | 19,501.00 | 20,242.00 | 20,984.00 |
| 12 | 760.29 | 788.83 | 817.37 | 848.18 | 879.02 | 912.11 |
| | 19,768.00 | 20,510.00 | 21,252.00 | 22,053.00 | 22,855.00 | 23,715.00 |
| 13 | 858.46 | 890.43 | 923.53 | 957.79 | 993.18 | 1,029.69 |
| | 22,320.00 | 23,151.00 | 24,012.00 | 24,903.00 | 25,823.00 | 26,772.00 |
| 14 | 970.34 | 1,006.88 | 1,043.40 | 1,082.21 | 1,122.16 | 1,164.42 |
| | 25,229.00 | 26,179.00 | 27,128.00 | 28,137.00 | 29,176.00 | 30,275.00 |
| 15 | 1,097.04 | 1,137.00 | 1,179.25 | 1,222.62 | 1,258.28 | 1,315.09 |
| | 28,523.00 | 29,562.00 | 30,661.00 | 31,788.00 | 32,975.00 | 34,192.00 |
| 16 | 1,239.74 | 1,285.42 | 1,332.22 | 1,382.44 | 1,432.67 | 1,486.33 |
| | 32,233.00 | 33,421.00 | 34,638.00 | 35,943.00 | 37,249.00 | 38,645.00 |
| 17 | 1,400.71 | 1,452.08 | 1,505.73 | 1,561.67 | 1,618.75 | 1,679.26 |
| | 36,418.00 | 37,754.00 | 39,149.00 | 40,603.00 | 42,088.00 | 43,661.00 |
| 18 | 1,582.21 | 1,640.44 | 1,700.94 | 1,754.87 | 1,829.94 | 1,897.29 |
| | 41,137.00 | 42,651.00 | 44,224.00 | 45,887.00 | 47,578.00 | 49,330.00 |

Employees will be paid in equal bi-weekly instalments. The bi-weekly rate of pay is the "official employee" salary and annual approximation figures will be provided for information purposes only.

5. The dispute between the parties is best illustrated by an example. As a result of valuing the work in the bargaining unit, a female job class that had been placed in Group 11 was found to be of equal value to a male job class that was placed in Group 13. The job rate for the female job class was its highest rate of compensation[5], $807.09 bi-weekly. The job rate for the comparable male job class was its highest rate of compensation, $1,029.69 bi-weekly.

6. To achieve pay equity, the parties agree that the job rate for the female job class must be adjusted to be at least equal to the male job rate. That adjustment is $222.60 bi-weekly.

4. Collective Agreement, supra, article 22.01

5. *Pay Equity Act, 1987*, S.O. 1987, c.34, as amended, s.1(1)

7. The issue then is how to adjust the rates of compensation for the incumbents in the female job class. CUPE states that the pay equity adjustment of $222.60 bi-weekly must be added to each increment level of Group 11 in order to achieve the new adjusted rates. The City states that each increment level in Group 11 should be moved to the same increment level in Group 13. That is, an employee who was at Step C in Group 11 would be moved to Step C in Group 13.

**Submission of CUPE**

8. CUPE said that pay equity is achieved when the job rate for the female job class is at least equal to the job rate for the male job class which was found to be of comparable value[6] . Therefore, in the example, the job rate for the female job class must be adjusted upwards by $222.60 bi-weekly.

9. CUPE then relied on the words of section 9(3) of the Act, which states:

> Where to achieve pay equity, it is necessary to increase the rate of compensation for a job class, all positions in the job class shall receive the same adjustment in dollar terms.

Therefore, CUPE submitted that every worker in the female job class must receive the same dollar adjustment of $222.60 bi-weekly.

10. CUPE stated that the method proposed by the City would result in the workers in the female job class receiving differing pay equity adjustments depending on their increment level on the grid. Counsel submitted that such a result was contrary to the clear words of section 9(3).

11. Counsel for CUPE relied upon comments of the Tribunal in a different case:

> In our view, subsection 9(3) provides that where compensation is increased by way of a payment to a job class, each position in that job class must receive the same monetary increase. In other words, it is not permitted to pay one position in a job class an adjustment of $0.25 per hour while another position in that job class receives a $0.32 per hour increase.[7]

12. Counsel also relied upon the Tribunal's comments:

> With respect to the Review Officer's finding that the Employer must uniformly apply the pay increases to all increment stages and salary ranges of the collective agreement, we agree.[8]

13. CUPE acknowledged that the new adjusted rates for the female job class would not match the rates for Group 13. CUPE stated that the preservation of the existing rates in a salary grid was not a valid consideration for the Tribunal. Counsel also said that the new adjusted rates could be a matter for future negotiations.

14. Counsel for CUPE said that if the City wished to preserve the salary grid, the City could agree to move the workers in the female job class to the next step in Group 13 that would compensate the workers at a rate equal to or greater than the adjusted rate required by section 9(3).

15. CUPE asked the Tribunal to give the words of section 9(3) their common ordinary meaning and to order the City to adjust the rates of compensation for each worker in the female job class by $222.60 bi-weekly.

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6. *Pay Equity Act*, supra, s.6(1)
7. *Lady Dunn General Hospital* (28 June 1991) 0166-91 (P.E.H.T.)
8. *Glengarry Memorial Hospital* (6 June 1991) 0141-90 (P.E.H.T.)

**Submission of the City**

16. The City maintained that adjusting the compensation of workers in the female job class by moving their rates of pay from their increment level in Group 11 to the same increment level in Group 13 would achieve pay equity for that female job class. Specifically, the provisions of section 6(1) would be met because the job rate for the female job class would be equal to the job rate for the male job class. Counsel stated that the new salary range for the female job class would be the same as the salary range for the male job class. The City wished to maintain its existing salary grid and to pay all employees in Group 13 the same increment levels.

17. Counsel for the City referred the Tribunal to the legislative history of section 9(3). This subsection was added to the bill during the clause by clause debate of the Justice Committee of the Legislature. Counsel for the City submitted that the legislative history of the amendment was clear and that in introducing the subsection, there was no intent to disrupt existing salary grids so long as pay equity was achieved.

18. The City said that when sections 1, 6(1), and 9(3) were read together, pay equity would be achieved by moving the range of salary rates for the female job class to the same range of salary rates as the male job class because then the job rates for the female job class and for the male job class would be identical.

19. Counsel for the City maintained that CUPE had wrongly interpreted the Act by focusing on incumbency. Counsel said that the Act had rejected incumbency and had used position and job class instead. She maintained that section 9(3) requires that all **positions** in the job class must receive the same dollar adjustment, not that all **incumbents** in those positions must receive the same dollar increase. Counsel stated that the City had satisfied the requirements of section 9(3) by making the same adjustments in the salary ranges for all the positions in the female job class.

20. Counsel for the City said that if the Act required the same dollar adjustment to each incumbent in the female job class, that requirement would have been made clear in the language of section 6(1) which states how pay equity is to be achieved. There is no such requirement in that section.

21. Counsel submitted that the requirement to provide the same adjustment to all positions in the female job class would be met because the City would uniformly move the salary range for the female positions to the same salary range as the male job class.

22. The City stated that its proposal to adjust the rates of compensation was more reasonable than CUPE's proposal, in that the female job class would receive the same rates of compensation as the comparable male job class. The City said that, in contrast, CUPE's proposal would create a new shadow grid for the female job class which, at certain steps on the grid, would be higher than the rates paid to the male job class. For example, the same dollar adjustments to all incumbents would mean that a newly hired employee in the female job class would receive more compensation than a newly hired employee in the comparable male job class. The City said that such adjustments would be illogical and unfair. Moreover, the creation of a shadow grid for the female job class would be a difficult compensation scheme to administer. Counsel stated that the City's proposal was more fair to employees, more reasonable to administer, and did not violate the Act.

**Decision**

23. The employer and the bargaining agent are obliged to examine the existing compensation system for the bargaining unit and to compare the value of the work performed for each female job class and for the male job classes[9] . The criteria used to determine the value of work is the composite of the skill, effort, and responsibility normally required in the performance of the work and the conditions under which it is normally performed[10] .

24. Once the employer and the bargaining agent have valued the work performed by the female job classes and by the male job classes, and have made the required comparisons, the parties must adjust the existing compensation system in order to achieve pay equity. The Act provides that pay equity is achieved when the job rate for the female job class in question is at least equal to the job rate for the male job class to which it has been compared[11] .

25. In this case, if a female job class that was compensated in Group 11 is of equal or comparable value to a male job class which was compensated in Group 13, then the job rate for the female job class must be moved to the job rate of the male job class, that is to $1,029.69 bi-weekly.

26. The application of section 6(1) and the achievement of pay equity, does not resolve the dispute between the parties, that is, how to adjust the compensation for incumbents in the female job class. CUPE asked the Tribunal to rely on section 9(3) which says that if it is necessary to increase the rate of compensation for a job class, then all the positions in the job class must receive the same adjustment in dollar terms. Therefore, the Tribunal must interpret section 9(3) and determine if it resolves the issue in dispute.

27. Section 9(3) was added as an amendment to the Pay Equity Bill during the debates of the Justice Committee of the Legislature. Each party asked the Tribunal to read the debates as supportive of their position. When read as a whole, we concluded that the debates were of little assistance to either party[12] .

28. Section 9(3) provides that if a job class is to receive an increase in the rate of compensation, then all positions in the job class shall receive the same dollar adjustment. This section refers to **positions** in a job class; it does not refer to **incumbents** in a job class.

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9 . *Pay Equity Act, 1987*, supra, s. 4(2)

10 *Pay Equity Act, 1987*, supra, s. 5(1)

11. *Pay Equity Act, 1987*, supra, s. 6(1)

12 Minutes of the Justice Committee, Ontario Legislature,
April 1, 1987 at p. J-9 thru p. J-11;
April 6, 1987 at p. J-9 thru p. J-13.

29. The term "position" is used in several sections of the Act, but is not defined. The relationship of "position" to "job class" has been considered by the Tribunal[13] . A job class means those positions that[14] :

(i) have similar duties and responsibilities;
(ii) require similar qualifications;
(iii) are filled by similar recruiting procedures; and
(iv) have the same compensation schedule, salary grade or range of salary rates.

The Tribunal concluded that positions must meet all four criteria in order to constitute a job class. Position, as a subset of job class, must be the same size or smaller than a job class. That is, one or more positions may be included in a job class if they meet the four criteria, but a position may not straddle more than one job class.

30. A "position" is not the same as "incumbent". The Act was designed to redress systemic discrimination in compensation and requires employers and bargaining agents to value the work performed, not the worth of the individual who performs the work.

31. The Act has been drafted so that "position" is distinguished from "incumbent" in several places. For example, section 1(7) provides that a position is not to be placed in a different job class only because the needs of the occupant of the position have been accommodated for the purpose of complying with the *Human Rights Code, 1981*. Second, "female job class" and "male job class" are defined as a percentage of "members" who are female and male respectively. Third, section 9(1) states that in order to achieve pay equity, an employer shall not reduce the compensation payable to any employee or reduce the rate of compensation for any position. The *Act* has distinguished between "position" on one hand and "incumbent", "occupant", "member" and "employee" on the other. Therefore, "position" is the work performed, not the person who performs the work; position is not identical to "incumbent"; and there may be one or more incumbents occupying a position.

32. Two or more incumbents will occupy a single position if those incumbents have **identical** duties and responsibilities, have the same qualification requirements, were recruited by the same procedures, and have the same compensation schedule, salary grade, or range of salary rates. Incumbents will occupy the same position if they meet all of these four criteria. For example, in this bargaining unit there are three incumbents in the position of assistant pool manager.

33. CUPE's second argument is that every increment level in each range of salary rates is a position. The Tribunal rejects this submission. In this bargaining unit, a position has a range of salary rates from a start rate to a maximum rate divided into six increment levels. An employee continues to perform the same job while she moves through the range of salary rates. That is, an employee does not move from position to position each year. Rather, an employee occupies a position, and moves through the range of salary rates for that position in six steps. Therefore, an increment level in a range of salary rates is not a position.

34. Section 9(3) requires that all positions in a job class receive the same dollar adjustment. Therefore, this section provides that if there are several positions in a job class, then each of those positions must receive the same dollar adjustment. For example, if the positions of Clerk I Finance and Clerk I Planning &

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13 *Wentworth County Board of Education* (1990), 1 P.E.R. 132 at p.157
14 *Pay Equity Act, 1987*, supra, s.1(1)

Development are in the same job class, and if that job class is to receive an increase in compensation, then both positions must receive the same dollar adjustment. Section 9(3) prohibits adjustments to compensation which are arbitrary or discriminatory between positions in a job class. But it does not answer the question of how to adjust the compensation of the incumbents in the female job class who are at various increment levels within the range of salary rates for a position.

35. The Tribunal concludes that section 9(3) does not address the issue in dispute. But that does not dispose of the matter. The purpose of the Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes[15] . In order to achieve this purpose, the employer and the bargaining agent are required to negotiate in good faith and endeavour to agree upon:

(1) the gender neutral comparison system to be used for the purposes of comparing the value of the work performed by the female job class and the work performed by the male job class; and

(2) a pay equity plan for the bargaining unit.

Under the Act, systemic discrimination in compensation is to be redressed by adjusting the rates of compensation of employees in the undervalued female job classes. In fashioning an appropriate remedy the Supreme Court of Canada has said:

> ... the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.[16]

36. In a pay equity plan, the compensation adjustment for incumbents in a female job class is one of the elements that must be bargained by the employer and the bargaining agent. Whatever method of adjustment is agreed to, it must redress systemic gender discrimination in compensation. The method of adjustment must also provide an effective remedy for systemic discrimination in compensation for employees in undervalued female job classes. We do not believe that, for example, it would be an appropriate remedy to deny any compensation adjustments to employees who are below the job rate. Nor do we believe it would be acceptable if the remedy meant that employees in undervalued female job classes would take twice as long to reach the job rate as employees in the comparable male job class. Neither result would be equity. Mere access to the male job rate for the employees in the undervalued female job class is not enough.

37. There may be several ways to adjust compensation. The Tribunal determines that both the method proposed by CUPE and the method proposed by the City will achieve pay equity and are consistent with the purpose of the Act.

38. But, as the parties were unable to resolve this outstanding issue, the Tribunal will determine the issue in order to settle the pay equity plan for the bargaining unit. The Tribunal determines that in this case the method of adjustment for incumbents proposed by the City is preferable to the method proposed by CUPE for four reasons.

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15 *Pay Equity Act, 1987*, supra, s.4(1)

16 *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at p. 92
Also see *Action Travail des Femmes v. Canadian National Railway Company*, [1987] 1 S.C.R. 1114 at p. 1141–1146

39. First, it moves the range of salary rates for the female job class to the same range of salary rates for the comparable male job class found to be of comparable value. Both male and female incumbents will receive the same rate at each step of the range, based on their seniority and merit.

40. Second, the incumbents in the female job class will reach the job rate in the same number of steps as the incumbents in the male job class. Since both the male job class and the female job class will now be paid at the same range of rates, this approach ensures that both male and female workers have the same access to the job rate, and will move to the job rate on the same basis or criteria.

41. Third, this approach will maintain the relationship between the steps in the female job class. For example, Step A will continue to be 83.4% of Step F, the maximum; Step B will continue to be 86% of Step F; etc.

42. Fourth, the method of adjustment proposed by the City makes good compensation sense. It moves incumbents in a female job class directly into the same steps in the salary range as the incumbents in the comparable male job class. CUPE's method would create a "shadow grid" for the adjusted rates which would be different than the grid for the comparable male job class and different than the grid for female job classes which did not receive a pay equity adjustment. Given the obligation to establish and maintain compensation practices that provide for pay equity[17] , we conclude that the shadow grid would be a more difficult compensation system to maintain.

43. For all of these reasons, the Tribunal determines that the method of adjusting the compensation of incumbents proposed by the City is to be used in the pay equity plan for the bargaining unit.

**Order**

44. The Tribunal orders the City and CUPE to complete the pay equity plan for the bargaining unit.

45. Where it is necessary to increase the rate of compensation for a female job class in this bargaining unit, then the incumbents in that female job class will be moved from their present increment level in the range of salary rates, to the same increment level in the range of salary rates for the male job class of comparable value.

## DECISION OF GERI SHEEDY, TRIBUNAL MEMBER, DECEMBER 18, 1991

1. I dissent from the majority decision on the interpretation and application of section 9(3) of the *Pay Equity Act*.

2. I agree with the majority which says at paragraph 35 that every employee in an undervalued female job class must receive a pay equity adjustment, and not just those employees paid at the job rate. Where I differ from the majority, however, is in my conclusion respecting how the amount of that adjustment is determined. In my view, section 9(3)of the *Act* requires that employees in the undervalued class receive the same amount in dollar terms.

3. The issue between the parties is how to determine the pay equity adjustments to which the employees in the female job class are entitled.

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17 *Pay Equity Act, 1987*, supra, s.7(1)

4. The parties agree on the interpretation of section 6 which says that pay equity is achieved when the job rate for the female job class is at least equal to the job rate for the male job class which was found to be of comparable value. Section 6 tells them how to adjust the job rate for the female job class, but does not tell them how to determine the adjustments to which members of the job class are entitled.

5. CUPE then relies on section 9(3) to deal with the issue of how those required pay equity adjustments are to be made to female employees in the affected female job classes in the establishment. CUPE's position is that the minimum legislative requirement is that the same dollar amount must go to each position in the job class. The way to achieve that is to take the job rate of the female job class and to subtract it from the job rate of the male comparator. The difference is the pay equity adjustment which must be applied to each position in the job class.

6. CUPE argues that there is a legal right granted by section 9(3) for each position in a female job class to receive pay equity adjustments in equal dollar amounts. The Tribunal cannot remove a legislated legal right.

7. CUPE relies on a literal interpretation of section 9(3) to define "position".

8. The question then becomes, what is the definition of "position" as used in section 9(3) of the *Pay Equity Act*. The section reads:

> Where, to achieve pay equity, it is necessary to increase the rate of compensation for a job class, all positions in the job class shall receive the same adjustment in dollar terms.

9. The term "position" is not defined within the Act. In fact, the term "position" is used in different sections of the Act in different ways. For example, section 1(7) refers to special accommodation under the Human Rights Code, of the occupant of the "position". Read together with section 5 (2), which also refers to such accommodation it is clear "position" in this context means an individual or incumbent. In section 1(6) "position" is used to show that a single position that is dissimilar to all other positions in an establishment may be a job class. "Position" in this clause may or may not refer to a single employee. In another context, in section 8(3) and (4) "position" is used to designate "work" which is performed on a casual basis.

10. It is also interesting to note that the parties themselves use the term "position" to mean several things. Given the inconsistent use of the term in the legislation, it is hardly surprising that the parties themselves use it in conflicting ways. For example, in Exhibit 15 (which is a document concerning employee status as of January 1, 1990) "position" is used to designate both job title and incumbent. This is simply to say that there does not seem to be one clear, well understood, mutually exclusive definition of the term.

11. Since the term is undefined and since its meaning is not consistent throughout the Act, it is necessary to provide a definition which makes sense in the context in which it is used. As a first step in this analysis, it is critical to look at the clear meaning and intent of "position" as it is used in section 9(3). To determine the meaning of "position" for this section, it is helpful to examine the reasons for which section 9(3) was added.

12. Section 9(3) was an amendment that was proposed in the Justice Committee hearings. It is of assistance to look at the discussions that surrounded the passing of this amendment. It was moved by Ms. Caplan (then Cabinet Minister in the government of the day) and explained thus:

> ... this deals with the reality of what is out there: that is, within a job class there is a range and there are different people placed within the class within the ranges. This will allow that to happen and respond to the reality that not everybody is at the same place in the range within a class. That is all this does and it is quite technical. (Minutes of the Legislative Committee, April 1, 1987 at p.J-9). (emphasis added).

Ms. Gigantes said in the committee hearings:

> I would like to lay out a work scenario and ask what the government conceives to be the result of this amendment. In a university, there is a class of clerical jobs where there are seven levels of jobs within that class and where it is found that a comparison can and should be made with, say, lab technicians and where within the lab technician group there are three levels. Further, in the clerk group, most of the clerical workers are in levels 2 and 3. At levels 6 and 7, there is one occupant at level 6.
>
> My understanding------ is that we are going to compare the top male technical rate with the level of the female class, namely clerk 2, that has the most occupants. We are going to decide on an absolute amount of money,..... and we decide that there is to be an increase of $10.00 a week. We are going to take the $10.00 and apply it to the clerk 7 who does not exist, to the clerk 6 who exists, and the clerk 5, 4, 3, 2,and 1. Is that correct?

Ms. Marlatt, policy expert from the Ontario Women's Directorate responded:

> What this amendment does is you have had to increase the job rate of the clerk 2 by $10.00 per week to connect with or to be equal to the lab technician 3. But if the job rate for the clerk 2 varied from $5.00 to $10.00 a week -- say that is the range of salary-- if you have had to take the $10.00 at the top and add $10.00 to it to make it $20.00,you also have to add $10.00 to the bottom so that ... (emphasis added).

Ms. Gigantes asked:

> That is within the clerk 2 level?

Ms. Marlatt clarified:

> Within the clerk 2 level, it takes all of the salary rates, and if you had to increase the comparable rate by $10.00 per week, you have to increase each of the ones in the others.

Ms. Gigantes:

> So the job class here is a job level; it is not a group of jobs...

Ms. Marlatt:

> This does not have anything to do with the series of job classes. This amendment has to do with the rate of pay.

Ms. Gigantes then asked how the amendment would apply if the clerical group as a whole was a job class.

Ms. Marlatt responded:

> That explains what happens within the clerk 2 level and what happens to each salary range there.

Ms. Gigantes:

> I have always thought of the clerk 2 level as a level.

Ms. Marlatt:

> There could be a dozen clerk 2s, each earning a different salary and this makes sure that each of the clerk 2 salaries moves in unison .

Marlatt continued:

> With that series you are moving a whole series and I think you would move them also in unison. If you said there was a relativity between the clerk series 1 through 7 and you moved the job rate for the series 2 by $10.00 , then you would be moving each job rate by $10.00, within and up and down the series. (emphasis added).

In response to other questions dealing with other amendments: Mr. Ward said:

> ... I have always understood that the amendment ... is dealing with it as 2 lines, clerks 1, 2, 3, 4, 5, 6, 7 and then the levels 1, 2, 3, 4. We are dealing with the horizontal lines. (emphasis added).

13. It is clear that the intent of the amendment was to adjust each level within a female job class by the same dollar amount throughout the grid. The Committee chose to use the term "position" in this section of the Act to describe such levels.

14. This amendment was put forward by the Government of the day and was supported by all parties in the House without discussion. It was discussed in Committee and it is clear that everyone understood the intent and purpose of the amendment, which in turn reflects the scheme of the Act and its purpose. It was added to this section of the Act to ensure that those women who are at the bottom of the scale, salary range, or salary grade would not be penalized. This amendment was passed, in my view, so as to prevent what the employer has proposed in this case.

15. As a further indication of the intent and scheme of the Act to redress wage discrimination for all women, particularly those women at the bottom wage rates, I refer to section 13(3). This section, although not related to section 9(3), does speak to the purpose of the *Act*. It provides that the female job class with the lowest job rate shall receive greater increases than female job classes already receiving a higher rate. Given this provision, it does not make sense then to suggest that only those women who are already at the top level of their salary range would receive an adjustment.

16. The inclusion of this provision in section 9, which is designed for the protection against reprisals is significant. The section is divided into three parts: no reduction of wages, no coercion or intimidation and the requirement that each position receive equal dollar amounts. It is a section of the Act that deals with the rights of individual employees. It is important to note it was not added to section 6, which deals with job rate. Section 9(3) prohibits an employer from giving all women in the female job class who have been found to be comparable to a male job class anything other than equal dollar amounts.

17. CUPE further relied on a previous decision of the Tribunal, *Glengarry Memorial Hospital* (6 June 1991) 0141-90 (P.E.H.T.) in which the Tribunal in paragraph 8 agreed with the Review Officer's finding that the employer must uniformly apply the pay increases to all increment stages and salary ranges of the collective agreement. The majority has chosen not to respond to this argument in their decision. I wish to note, however, that I also agree with the Review Officer's finding as the correct interpretation of section 9(3).

18. In summary, in determining the meaning of "position" in section 9(3) I have examined the use of "position" throughout the *Act*, the legislative intention behind the enactment of the section and the scheme and the purpose of the *Act* generally. I have concluded that each salary step in a female job class constitutes a "position" for the purpose of 9(3).

19. To do as the majority suggests and conclude that section 9(3) does not address the issue in dispute would leave us with only section 6 to determine how pay equity is to be achieved. If this were the case, once the female job rate has been adjusted and is made equal to the job rate of the male comparator the parties need go no further. That is, since "job rate" is defined as the highest rate of compensation, only those employees in female job classes at the highest rate of pay would receive any adjustment.

20. What would persuade an employer to give more than is required by section 6 to any employee? What then happens to all of the employees in a female job class who are not at the top rate of the job? Following the majority's approach, they would not get any increase or pay equity adjustment. The majority suggests all women must get an increase, but does not show how this would happen, or what part of the Act is relied on.

21. The majority's analysis is in direct opposition to the intent of the amendment. This Act is anti-discrimination in nature, as stated in the preamble and it is directed to redressing discrimination in the compensation of "employees" employed in female job classes in Ontario". Again as stated in section 4, the purpose of the *Act* is to redress systemic gender discrimination in compensation for work performed by "employees" in female job classes. The analysis of the majority would leave the compensation of many if not most employees employed in female job classes untouched, except in the sense that they would have access to the adjusted job rate for the female job class in which they are employed.

22. Indeed, in this case, where advancement through the grid is based on merit and seniority and is determined at the discretion of the employer, actual pay equity might never be achieved.

23. The Act does not intend or say anything about access or potential. These words do not exist in the *Act*. The *Act* does not say that when women have access to a higher job rate pay equity is achieved, or when women have the potential to reach a higher job rate that pay equity is achieved. Section 9(3) was added to the *Act* to ensure that all employees employed in female job classes would receive pay equity adjustments and further to specify how those adjustments are to be determined: that is, in equal dollar amounts.

24. The suggestion of the majority, in paragraph 33 of their decision, that section 9(3) was only intended to address situations in which an employer would attempt to avoid paying pay equity adjustments to employees in different job titles grouped within a job class makes little practical sense. How an employer would justify such a suggestion is difficult to imagine. But, beyond this, given that the Legislature intended through its definition of job class that only positions with "similar duties" would be grouped together, it is hard to imagine such a situation arising. The definition of job class, taken together with the clearly stated intention of the Justice Committee, indicates that the point of section 9(3) was to ensure that those employees in female job classes at the "bottom" of their level would receive the same dollar amount, in "unison" with those employees at the "top". Marlatt's response to Gigantes question makes this glaringly clear. Question: "Within the clerk 2 level?" Answer "**Within** the clerk 2 level." (emphasis added).

25. While I agree there may be different ways to negotiate the pay out of money, I hold that the method chosen must meet the minimum requirements of the Act. Once the issue has come to the Tribunal for adjudication, the Tribunal is obliged to interpret the section of the Act before it. The Tribunal cannot compromise on that which is clearly designated as a right. The Tribunal will on occasion have to decide a case on grounds of reasonableness, but only in cases where the minimum requirements of the *Act* have been met. It would then be appropriate for the Tribunal to decide which party's position is most reasonable. This was done for example in the case of *Lady Dunn General Hospital* (28 June 1991) 0166-91 (P.E.H.T.). This is not such a case.

26. The Act does not address the issue of having to maintain an existing grid. The Justice Committee did comment on not disrupting the existing classification systems, however that is not an issue here. No one is suggesting that the clerks be reclassified to the job classification occupied by their male comparators. Section 13(10) does provide however that "A pay equity plan that is approved under this part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements." The plan prevails over the existing collective agreement. The words are clear and cannot be construed to mean only if it does not upset the existing compensation practices. The whole point of the *Act* is to upset existing compensation practices; after all, they are responsible for the pay inequities which have been found to exist.

27. For all of the above reasons I dissent from the majority decision. I would find that all of the positions, positions being defined as each step in each level of the grid, for the female job classes, should be adjusted by equal dollar amounts.